(3)

No. 86-629

IN THE

Supreme Court of the United States

October Term, 1986

SEATTLE MASTER BUILDERS ASSOCIATION, et al.,
Petitioners,

v.

PACIFIC NORTHWEST ELECTRIC POWER
AND CONSERVATION PLANNING COUNCIL,
Respondent,

UNITED STATES OF AMERICA,
Intervenor-Respondent.

APPENDICES N THROUGH X (VOL. 2 OF 2) TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN W. HEMPELMANN
Counsel of Record, and

PAUL SIKORA
MICHAEL B. KING
DIAMOND & SYLVESTER
2600 Columbia Center
701 Fifth Avenue
Seattle, Washington 98104-7088
(206) 623-1330
Attorneys for Petitioner

eBCD Legal Printers, Seattle, WA

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APPENDIX N

1983 NORTHWEST CONSERVATION AND ELECTRIC POWER PLAN VOLUME II

Adopted Pursuant to the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (P.L. 96-501)
April 27, 1983

Table J6-1a.
Alternative Component Packages for Climate Zone 1—4,000 to 6,000 Heating Degree Days at 65°F
Single-Family Dwellings (R-3 Occupancy)

Component	Package A Well Insulated	Package B Low Infiltration	Package C Sun Tempered	Package D Passive Solar	Package E Heat Pump
Building Envelope					
Insulation Minimums					
Ceiling	R-38	R-38	R-38	R-30	R-30
Wall	R-27	R-19	R-25	R-19	R-19
Slab Floor Perimeter	R-10	R-10	R-10	R-10	R-6.35
Floor Over Unconditioned Space	R-19	R-30	R-19	R-19	R-19
Exterior Doors (DISI No.)	2.0	2.0	2.0	2.0	6.5
(EDII No.)	—	—	—	—	6.5
Glazing					
Maximum U Value	.37	.37	.47	.47	.47
Maximum Total Area[1]	15%	15%	15%	No Requirement	No Requirement
Minimum Effective Solar Glazing Area[2]	No Requirement	No Requirement	8%	10%	No Requirement
Thermal Mass[3]	Not Required	Not Required	Not Required	Required	Not Required
Space Conditioning System					
Heating System Type	No Special Requirement	No Special Requirement	No Special Requirement	No Special Requirement	High-Performance Heat Pump (S.P.F. = 2.0)[4]
Infiltration Control Package (See table J6-3)	A	A	A	B	A

[1]Percent of conditioned floor area. [2]See Section 601C for calculation.
[3]See Section 601B for calculation. [4]See Equation 7 for calculation.

Table J6-1b.
Alternative Component Packages for Climate Zone 2—6,001 to 8,000 Heating Degree Days at 65 °F
Single-Family Dwellings (R-3 Occupancy)

Component	Package A Wall Insulated	Package B Sun Tempered	Package C Passive Solar	Package D Heat Pump
Building Envelope				
Insulation Minimums				
Ceiling	R-38	R-38	R-38	R-38
Wall	R-31	R-25	R-25	R-19
Slab Floor Perimeter	R-12	R-12	R-12	R-12
Floor Over Unconditioned Space	R-30	R-30	R-19	R-19
Exterior Doors (DISI No.)	2.0	2.0	2.0	6.5
(EDII No.)	—	—	—	6.5
Glazing				
Maximum U Value	.37	.37	.37	.47
Maximum Total Area[1]	15%	15%	15%	No Requirement
Minimum Effective Solar Glazing Area[2]	No Requirement	8%	10%	No Requirement
Thermal Mass[3]	Not Required	Not Required	Required	Not Required
Space Conditioning System				
Heating System Type	No Special Requirement	No Special Requirement	No Special Requirement	High-Performance Heat Pump (S.P.F. = 2.0)[4]
Infiltration Control Package				
(See table J6-3)	B	B	B	A

[1]Percent of conditioned floor area. [3]See Section 601C for calculation.

[2]See Section 601B for calculation. [4]See Equation 7 for calculation.

Table J6-1c.
Alternative Component Packages for Climate Zone 3—Over 8,000 Heating Degree Days at 65 ° F
Single-Family Dwellings (R-3 Occupancy)

Component	Package A Well Insulated	B Sun Tempered	C Passive Solar	D Heat Pump
Building Envelope				
Insulation Minimums				
Ceiling	R-38	R-38	R-38	R-38
Wall	R-31	R-25	R-25	R-19
Slab Floor Perimeter	R-15	R-15	R-15	R-15
Floor Over Unconditioned Space	R-30	R-30	R-19	R-19
Exterior Doors (DISI No.)	2.0	2.0	2.0	6.5
(EDII No.)	—	—	—	6.5
Glazing				
Maximum U Value	.37	.37	.37	.47
Maximum Total Area[1]	15%	15%	No Requirement	No Requirement
Minimum Effective Solar Glazing Area[2]	No Requirement	8%	10%	No Requirement
Thermal Mass[3]	Not Required	Not Required	Required	Not Required
Space Conditioning System				
Heating System Type	No Special Requirement	No Special Requirement	No Special Requirement	High-Performance Heat Pump (S.P.F. = 2.0)[4]
Infiltration Control Package				
(See table J6-3)	B	B	B	A

[1]Percent of conditioned floor area. [2]See Section 601B for calculation. [3]See Section 601C for calculation. [4]See Equation 7 for calculation.

Table J6-1d.
Alternative Component Packages for Multi-Family (R-1 Occupancy) Dwellings and Other Occupancies up to 5,000 Square Feet

Component	Climate Zones 1 4,000-6,000 Heating Degree Days	2 6,001-8,000 Heating Degree Days	3 Over 8,000 Heating Degree Days
Building Envelope			
Insulation Minimums			
Ceiling	R-30	R-30	R-30
Wall	R-19	R-25	R-25
Slab Floor Perimeter	R-10	R-15	R-15
Floor Over Unconditioned Space	R-19	R-30	R-30
Exterior Doors (DISI No.)	2.0	2.0	2.0
Glazing			
Maximum U Value	.47	.47	.47
Maximum Total Area[1]	15%	15%	15%
Infiltration Control Package			
(See table J6-3)	B	B	B

[1]Percent of conditioned floor area.

Table J6-2.
Minimum Thermal Mass Requirements

Solar Glazing as a Percent of Conditioned Floor Area	Minimum Heat Storage Capacity Requirements Btu/° F/sq ft of Solar Glazing[1]
0-8	No Requirement
9-14	30
Over 15	45

[1]Calculated using Equation 6, chapter 4.

Step. 1. Identify Thermal Efficiency Levels in New Housing. The Council assumed that new residential buildings were being constructed in compliance with current building codes. In those areas which have not adopted mandatory energy conservation codes for new buildings, the Council attempted to identify "current practice." The principal data sources for this latter procedure were discussions with home builders and an annual survey of new housing characteristics conducted for Bonneville. Table K-14 summarizes the Council's assumptions regarding the level of thermal efficiency present in new residential buildings.

Step 2. Estimate Cost and Potential Savings for Thermal Efficiency Improvements in New Dwellings. Tables K-15 through K-17 show the Council's estimate of the cost and savings available through

improved thermal efficiency in new residential buildings on a measure-by-measure basis. The cost estimates are given in 1980 dollars. The savings estimates are based on the Sunday computer simulation of the annual space heating energy use of new dwellings assuming no wood heating and an average 24-hour per day thermostat setting of 65°F. Waste heat given off by lights, appliances, and occupants was assumed to provide 5,133 kWh/year of "free heat."

Step 3. Compare Projected Cost and and Energy Savings with Observed Cost and Savings in New Energy-Efficient Buildings. The Council compared the simulated energy use for new buildings to metered energy use in energy-efficient houses in the Northwest. For a sample of 39 energy-efficient houses, the Council's projected annual use for space heating was 2.7 kilowatt-hours per square foot per

year. The average actual use of this sample was 2.8 kilowatts per square foot per year - a difference of less than 4 percent.

Step 4. Develop Conservation Supply Functions. The potential for conservation in new dwellings is directly related to the number of new dwellings built. Under the Council's high economic and demographic forecast, it is projected that approximately 2.327 million new electrically heated housing units will be built between 1986 and 2002. Of these, 71 percent (1.666 million) are expected to be single-family units, 17 percent (393,000) multi-family units, and 12 percent (268,000) mobile homes. To estimate the technical potential for conservation in new dwelling units the Council multiplied the savings shown in tables K-15 through K-17 per unit for individual measure times number of those units projected to be

built. Table K-18 summarizes the results of this process.

Step 5. Estimate Realizable Conservation Potential. The Council's estimate of realizable potential for conservation savings in new residential buildings is based on the implementation of its proposed model efficiency standard. The adoption of this standard would reduce the projected regional average energy use per unit in the 2002 from an estimated 6,896 kilowatt-hours per unit to 2,967 kilowatt-hours per unit. If 100 percent of the 2.327 million electrically heated buildings built between 1986 and 2002 complied with this standard, the region would save 1,044 megawatts (2.327 million units x 6,896 kWh/unit - 2,967 kWh/unit + 8,760 x 1,000). The Council's plan anticipates that 90 percent of the new units built will comply with its proposed standard. Therefore, the projected 1,044 megawatts

of savings from this standard were "discounted" for less than complete compliance, reducing the expected savings to 940 megawatts. The Council's plan captures 880 megawatts of these savings as a resource. The remaining 60 megawatts are assumed to be "retained" by consumers in the form of increased amenity levels (e.g., warmer houses). The distribution of the savings expected from the Council model standard for new dwellings by state is approximately as follows: Washington - 420 megawatts, Oregon - 300 megawatts, Idaho - 130 megawatts, and Western Montana - 30 megawatts.

Table K-14.
New Residential Construction Base Case Efficiency Levels and Annual Space Heating Use Assumptions

	Climate Zone						
	1		2		3		
Building Type	Insulation Level	Annual Use (kWh/sq ft)	Insulation Level	Annual Use (kWh/sq ft)	Insulation Level	Annual Use (kWh/sq ft)	Weighted Average Use (kWh/sq ft)
Single-Family		5.5		8.9		9.0	6.8
Ceiling/Roof	R-30		R-30		R-38		
Walls	R-11		R-11		R-11		
Underfloor	R-11/19		R-11/19		R-11/19		
Windows	Double glazed*		Double glazed*		Double glazed		
Multi-Family		3.4		6.0		7.2	4.3
Ceiling/Roof	R-30		R-30		R-30		
Walls	R-11		R-11		R-11		
Underfloor	R-11/19		R-11/19		R-11/19		
Windows	Double glazed		Double glazed		Dougle glazed		
Mobile Homes		6.5		10.0		13.0	8.6
Ceiling/Roof	R-19		R-19		R-19		
Walls	R-11		R-11		R-11		
Underfloor	R-11		R-11		R-11		
Windows	Double glazed*		Double glazed*		Double glazed		

Table K-15.
Technical Potential for Energy Conservation in New Single-Family Buildings

Resource Description	Unit Cost 1980$	Life Years	Climate Zone 1 Energy (kWh/unit)	2 Energy (kWh/unit)	3 Energy (kWh/unit)
Insulate Roof					
R19 to R30	176	30	729	1,097	1,266
R30 to R38	137	30	239	363	427
R38 to R49	176	30	156	262	313
R49 to R60	176	30	106	179	215
Infiltration					
.6-.4	381	30	1,096	1,650	1,927
.4-.2	635	30	941	1,471	1,745
Insulate Floors					
R11 to R19	200	30	422	637	750
R19 to R30	301	30	290	480	571
R30 to R42	652	30	171	312	380
Insulate Glass					
1-2	302	30	2,046	3,005	3,499
2-3	346	30	584	875	1,046
3-4	495	30	200	347	419
2-3 (Casement/awnings)	631	30	584	875	1,046
Insulate Walls					
R11 to R19	396	30	860	1,284	1,480
R19 to R27	382	30	365	554	653
R27 to R31	150	30	127	190	229
R31 to R38	569	30	72	136	168
Doors					
R2 to R13	87	30	474	702	814

APPENDIX O

1983 NORTHWEST CONSERVATION AND ELECTRIC POWER PLAN VOLUME IV

Adopted Pursuant to the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (P.L. 96-501)
April 27, 1983

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[112] "APPENDIX J"
CONSERVATION STANDARDS FOR NEW RESIDENTIAL AND NON-RESIDENTIAL BUILDINGS

. . . .

Economic Feasibility For New Residential Buildings. Several homebuilders organizations and building material suppliers questioned the economic feasibility of the Council's model standard for new residential structures. They asserted that the use of triple pane windows and high R-value (in excess of R-19) walls was neither cost-effective to the region nor economically feasible for consumers.

Other groups, including NRDC, several individual homebuilders, and MDNRC supported the Council's standard as cost-effective and economically feasible.

RESPONSE: The Council analyzed the cost-effectiveness of triple pane and high R-value walls to the region. Triple pane windows in climate zone 1 could cost up to $9.54/per square foot (in 1982 dollars) of window area and [113] remain cost-effective to the region. This cost assumes that these windows are replacing non-thermal break aluminum framed double pane windows. The actual cost to consumers of making this alteration in new construction based on a review of cost provided by five regional homebuilders and three other sources representing 41 window suppliers ranged from $3.09/per square foot to $9.43/per square foot of window area. All of these costs fall within the cost-effectiveness limit. In addition, both the

average ($5.10/per square foot) and the median ($4.60/per square foot) cost estimates represent regional resources that could be acquired for less than 25 mills/per kilowatt hour (1982 dollars).

The cost-effectiveness of the high R-value walls was also analyzed by the Council. Based on a survey of 8 sources and 14 builders, the cost to consumers of obtaining an R-27 wall versus an R-11 wall ranged from $.59/per square foot of gross wall area to $1.37/per square foot of gross wall area. The average cost was $.76/per square foot and the median was $.57/per square foot. Both the mean and the median cost represent resources costing less than 40 mills/per kilowatt-hour (1982 dollars). The upper limit of regional cost-effectiveness in climate zone 1 is $.94/per square foot (1982 dollars). See table 1.

The cost used in the Council's initial assessment of the "economic feasibility to consumers" of triple pane windows was $3.05/per square foot of window area. The incremental cost of R-27 walls was originally estimated at $.45/per square foot of wall area. The mean cost obtained through public comment was approximately 68 percent higher for both of these measures. This fact, in addition to the revised base case assumptions regarding window characteristics and insulation levels, necessitated a review of the model standard's "economic feasibliity to consumers." This review assumed the following:

- Discount rate = 10 percent real
- Mortgage rate = 6 percent real
- Cost of electricity = 4¢/per kilowatt-hour
- Electricity escalation rate = .5 percent per year real
- Mortgage = 30 year, fixed rate

- Downpayment = 10 percent
- Builder overhead, fees and profit = 36 percent of hard cost.

The Council found that:

1. The life cycle cost to a consumer of complying with the Council's model standard for zone 1 is less than that for current codes at costs up to $2.00 per square foot of floor area. The staff estimates the cost to consumers of complying with the zone 1 standard at between $1.75-$1.85/per square foot.

2. The life cycle cost to a consumer of complying with the Council's standard for zones 2 and 3 is lower than current codes for cost up to $3.25/per square foot of floor area. The staff estimates of the cost of complying with the model standard at between $2.50-$2.75/per square foot for zone 2 and $2.25-$2.50 for zone 3.

3. The average cost of zone 1 standard (assuming $1.85/per square foot) is

2.5 cents per kilowatt-hour.

[114] 4. The average cost of the zones 2 and 3 standard (assuming $2.75/per square foot) is 2.2 cents per kilowatt-hour.

5. No prescriptive measure included in any zone exceeds a marginal levelized cost of 3.5 cents per kilowatt-hour.

The Council also conducted additional analysis to assess the sensitivity of the above findings to changes in input assumptions.

Based on the data submitted by builders and others, the Council's model standard for space heating in new residential structures appears to remain economically feasible and regionally cost-effective. The Council's final plan retains the same model standard for new residence as were included in the draft. However, it also includes a research and demonstration program to further test the stan-

dard's economics. Finally, although no change was made in the standard, several of the illustrative prescriptive paths depicted in appendix J of the draft plan were modified to reflect revised base case assumptions regarding current building practice and more refined perfomance analysis.

Commercial Lighting Standard. Numerous commenters indicated that the Council's commercial building standard was not agressive enough. ASHRAE recommended that the lighting budget for retail stores be set at 1.5 watts/per square foot. NRDC recommended a reduction in all of the Council's commercial building lighting budgets. NRDC estimated that these standards would reduce commercial deamand by 980 megawatts. This estimate was developed using the Council's Commercial Sector Forecasting Model.

RESPONSE: ASHRAE did not provide analytical support of its recommendation. NRDC provided a detailed technical analysis supporting the cost effectiveness and technical feasibility of its recommendations. The Council reviewed NRDC's proposed lighting standard and its affect on commercial building energy use. Analyses revealed that NRDC's proposal is based on accepted illuminating industry standards and available technology. However, the proposed standard is significantly more stringent than has been adopted by code anywhere in the country. The Council's lighting budget for retail stores was set at 1.5 watts/per square foot. NRDC's recommendation that the budget be set at 1.0 watts/per square foot was rejected because the Council felt it represented too dramatic a departure from current practice without further opportunity for public comment.

Commercial Building Performance Standards. Several commenters recommended that the Council include a total performance standard for new commercial buildings.

RESPONSE: California is the only state which has developed total building energy budgets for commercial structures. However, the California budgets are less agressive than the Council's model standard. The U.S. Department of Energy is expected to release its building Energy Performance Standards sometime this summer. Also, a more stringent version of ASHRAE's standard . . .

APPENDIX P

No. 83-7585

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE MASTER BUILDERS ASSOCIATION,
et al.,

Petitioners,

v.

NORTHWEST POWER PLANNING COUNCIL,

Respondents,

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON PETITION FOR REVIEW FROM THE
NORTHWEST POWER PLANNING COUNCIL

BRIEF FOR THE UNITED STATES AS INTERVENOR

OF COUNSEL:
HARVARD P. SPIGAL
General Counsel
JAMES O. LUCE
Assistant General
Counsel
PAUL S. MAJKUT
STEPHEN R LARSON
PRESTON D. MICHIE
MARYBETH VAN BUREN
Attorneys
Bonneville Power
Adminsistration
Portland, Oregon
97208

RICHARD K. WILLARD
Acting Assistant
Attorney General
PAUL BLANKENSTEIN
ROBERT V. ZENER
Attorneys,
Appellate Staff
Civil Divison,
Room 3127
Department of
Justice
Washington, DC
20530
Telephone:
(202) 633-4027

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[12] II. OTHER PROVISIONS OF THE COUNCIL'S AUTHORITY, NOT INVOLVED IN THIS CASE, MAY RAISE DIFFICULT ISSUES UNDER THE APPOINTMENTS CLAUSE.

Summary

In addition to its authority to recommend model conservation standards and surcharges, the Council has several other authorities under the Act. Some of these authorities may be "significant" under the Buckley test. In the case of other provisions of the Act, whether they vest the Council with "significant authority" in the constitutional sense depends to a significant degree on issues of statutory interpretaion. While the parties' briefs urge the Court to decide these issues in a manner that enhances the Council's authority, the Court should decline the invitation to interpret provisions of the statute not involved in the case, particularly since the provisions involved cannot

be meaningfully interpreted absent a more specific factual context.

The constitutional issues raised by the provisions of the Act that may vest the Council with significant authority are difficult.

On the one hand, the Appointments Clause clearly prohibits state appointment of federal officers; the Council's argument that the Clause prohibits only congressional appointment of federal officers has no merit. Moreover, while the Act provides that the Council shall not be considered a federal agency, 16 U.S.C. § 839b(a)(2)(A), since federal agencies are the only entities on which the Council may have authority to impose legal [13] obligations, the Council could be viewed as a federal rather than a state authority from a functional standpoint.

On the other hand, there are clearly some situations in which Congress may constitutionally require federal agencies to comply with state law and to obtain approvals from a state agency in connection with a federal project. A case like the present one--which pertains to a joint federal-state effort designed to solve a regional rather than a national problem--could be one of those situations.

A. Two Provisions of the Council's Authority May Be "Significant" In The Constitutional Sense.

There are two respects in which the Council may have authority to impose substantive restrictions on Bonneville, in a manner which meets the Buckley test of "significant" federal authority.

First, the Act establishes a limit on the amount of power that can be sold to direct-service industrial customers and

provides that, after the Council has adopted its conservation plan, the Bonneville Administrator may increase sales to these customers only after the increase is found by the Administrator and the Council to be consistent with the plan. 16 U.S.C. § 839(c)(d)(3).

Second, the Act requires Bonneville to obtain appropriation act approval to take certain actions relating to major resources if the Council determines these actions to be inconsistent with its plan. 16 U.S.C. § 839d(c)(3). Petitioners have argued that this may constitute a veto. [14] The parties also urge the Court to hold that other provisions of the Act vest the Council with significant authority over the actions of Bonneville. See Master Builders' Brief at 50; Pacific Legal Foundation Brief at 11-13. However,

these provisions raise unresolved issues of interpretation that would have a bearing on the determination of the respective responsibilities of the Council and Bonneville in a wide variety of settings. The Court does not have to reach those issues in this case; moreover, they are the type of issues that would be illuminated by specific factual contexts--and the facts of this case do not involve these provisions and thus do not present the factual background necessary for an informed interpretation. Indeed, we are hopeful that Bonneville (and other federal agencies) and the Council will continue to work together in an atmosphere of cooperation and accommodation that will render unnecessary the resolution of legal issues regarding their respective legal responsibilities, that would arise only where they

are in sharp disagreement over a major case.

For example, Pacific Legal Foundation cites a provision of the Act requiring Bonneville, when it exercises its authorities to protect fish and wildlife, to do so in a manner consistent with the Council's fish and wildlife program and energy plan. 16 U.S.C. § 839b(h)(10)(A). However, the roles of Bonneville and the Council in fish and wildlife matters are not involved at all in this case, which concerns model conservation standards. Moreover, the impact of this provision is further limited since [15] it requires the Administrator to also act consistent with other "purposes of the Act." These other purposes require Bonneville to balance its fish and wildlife protection responsi-

bility with its responsibility to provide an adequate, efficient, economical and reliable power supply. 16 U.S.C. § 839(2).[4]

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[4] Another provision at issue requires Bonneville's actions pursuant to section 6 (i.e., resource acquisitions) to be consistent with the Council's conservation plan, "except as otherwise specifically provided in this chapter." 16 U.S.C. § 839b(d)(2). See also 16 U.S.C. § 839d(b)(1). As to major resources, as discussed in the text, petitioners argue that the Council has significant authority. However, as to non-major resources, the Act specifically provides that the Administrator may acquire a resource that is not consistent with the plan, if the Administrator (not the Council) finds the acquisition to be consistent with the governing statutory criteria. 16 U.S.C. § 839d(b)(2). Thus as to non-major resources, Council's plan is, as Congress intended, a planning document prepared by a separate body and designed to inform and guide the ultimate decision maker, while preserving for the Administrator the independent authority to apply the statutory criteria. This interpretation is consistent with the legislative history, which characterizes the Council's plan as a "guide" to the Administrator. H.R. Rep. No. 976, Part I,

[16] To the extent that Bonneville's interpretation of ambiguous statutory provisions might differ from the Council's, there are four considerations favoring deference to Bonneville's views.

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4 (FOOTNOTE CONTINUED)

96th Cong., 2d Sess. 28, reprinted in, 1980 U.S. Code Cong. & Ad. News 5989, 5994; H.R. Rep. No. 976, Part II, supra, at 33, 40; 6031, 6038. As the Chairman of one of the Committees that considered the legislation put it: "The Council cannot bind the United States in any way, manner, or form * * *." 126 Cong. Rec. H10681 (daily ed. Nov. 17, 1980) (Rep. Dingell). See also 126 Cong. Rec. H10674 and H9842-43 (daily ed. Nov. 17 and Sept. 29, 1980) (Rep. Kazen); 126 Cong. Rec. H9852 and H9863 (daily ed. Sept. 29, 1980) (Reps. Swift and Foley).

Moreover, in making a determination whether his actions under 16 U.S.C. § 839d with regard to conservation and resource acquisition are "consistent" with the Council's plan (see 16 U.S.C. § 839b(d)(2), 839d(a)(1) and 839d(b)(1), the Adminsitrator must also balance his other statutory responsibilities and practical limitations (e.g., funding limitations). 16 U.S.C. § 839f(b). These responsibilities include encouraging the widest possible use of electric energy, 16 U.S.C. § 832a(b), at the lowest possible rates to consumers [16] consistent with sound business principles, 16 U.S.C. § 825s, and assuring the Pacific Northwest an adequate,

First, it is Bonneville, not the Council, that is charged by Congress with actually administering the statutes pertaining to the Columbia River Power System, including the Northwest Power Act. See 16 U.S.C. § 839f(b). The Council has a more detached function, primarily of a planning nature.

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[4] (FOOTNOTE CONTINUED)

efficient, economical and reliable power supply. 16 U.S.C. § 839(2).

Another provision discussed in the parties' briefs authorizes the Council periodically to review Bonneville actions to determine whether they are consistent with the plan and for other reasons. 16 U.S.C. § 839b(i). The Council may request the Administrator to take action to carry out the plan; and if the Administrator determines not to take the requested action, he must explain the basis for his refusal, and the Council may request an informal hearing. 16 U.S.C. § 839b(j). However, in this respect the Council's status does not differ from that enjoyed by private parties under several federal statutes, who may petition federal agencies to take action and may effectively require the agency to hold a hearing or make appropriate findings before denying the petition. See Davis, Administrative Law Treatise § 6.12 (2d ed. 1978); 15 U.S.C. § 2620 (provision of Toxic Substances Control Act governing procedures for citizens' petitions).

Second, in order to find that a federal agency is subject to control of state-appointed officers, there must be "'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous'." Hancock v. Train, 426 U.S. 167, 179 (1976). Third, the Court [17] should avoid interpretations that would raise a constitutional issue under the Appointments Clause. Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), vacated on other grounds, 431 U.S. 99 (1977). Fourth, to the extent that interpretation of the Act affects Bonneville's responsibilities, Bonneville's interpretation of the Act is entitled to "great weight." Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist., 104 S. Ct. 2472, 2479-80 (1984); Chevron U.S.A. Inc. v. Natural Resources Defense Council, 105 S. Ct. 28 (1984).

For purposes of this case, it is sufficient that the statutory provision affecting petitioners (model conservation standards and surcharges) does not present the Appointments Clause issue. But even if the Court were disposed to reach beyond this provision to address other matters not properly presented, the Appointments Clause issue would be clearly presented only with respect to the two provisions (those permitting the Council to disapprove an additional sale to direct service industrial customers or the acquisition of a major resource, if inconsistent with the plan) that actually give the Council an active role with respect to the Administrator's decisions.

B. A Substantial Issue Under The Appointments Clause Is Raised By Two Provisions of the Act.

With respect to two provisions of the Act previously described, 16 U.S.C. §§ 839c(d)(3) and 839d(c)(3) (relating to

sales to direct service industrial customers and major resource [18] acquisitions), we believe that a difficult constitutional issue would be raised under the Appointments Clause if the Council were to have occasion in the future to disapprove a proposed action of the Administrator. Our discussion of the merits of this issue is designed to show the Court that the issue has more complexity than might be gathered from the briefs filed to date. We express no view at this time as to how that issue should be resolved if the Court should reach it. The complexity and importance of the constitutional issue reinforces the considerations we set forth in Point III, infra, to show that the issue should not be decided in the context of this case.

The Appointments Clause provides that federal officers shall be appointed by the President, with specified exceptions. The Council argues that the sole

intent of the Clause was to protect the Executive authority from congressional encroachment, and therefore the Clause should not be read to preclude appointments by the governors. This view is untenable, for several reasons.

First, the express language of the Clause is that "[the President] * * * shall appoint" officers of the United States--the Clause does not provide that "the Congress shall not appoint" officers of the United States. Second, congressional authority would be enhanced at the expense of the Executive if Congress had unrestricted power to confer the appointment authority on third persons.

Finally, the Framers had a clear intent to preclude state as well as congressional appointments. Indeed, at the Constitutional Convention, a motion to allow the appointment authority [19] to be "vested in the Legislatures or Executives

of the several States" was defeated after Gouverneur Morris objected that:

> This would be putting it in the power of the States to say, "You shall be viceroys but we will be viceroys over you.

II Farrand, The Records of the Federal Convention of 1787, 406, 418-19 (rev. ed. 1937).[5]

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[5] Before the vote on the motion, the reference to the "Legislatures" was stricken by consent, on the ground that "[i]f this be agreed to it will soon be a standing instruction from the State Legislatures to pass no law creating offices, unless the appointments be referred to them." II Farrand, The Records of the Federal Convention of 1787, 406 (rev. ed. 1937).

Another indication of the Framers' intent is found in the Federalists Papers, which describe one of the great weaknesses of the Articles of Confederation as being the need for the federal government to obtain the states' consent for every important federal action. As Hamilton put it, "the concurrence of thirteen distinct sovereign wills is requisite, under the Confederation, to the complete execution of every important measure that proceeds from the Union." Federalist Papers No. 15. A principal purpose of the Constitution was to eliminate this weakness, by allowing the federal government to "carry its agency to the persons of the citizens" without the "intermediate" assent of

Accordingly, it would violate both the language and the intent of the Appointments Clause for Congress to vest in the states the authority to appoint an official with national executive responsibilities, such as a Cabinet or sub-Cabinet officer.

However, this case could be viewed differently, since it involves a federal law dealing with an exclusively regional [20] problem, and officials acting only within the four states from which they were appointed.[6] The question then becomes whether, because of this feature of the case, the Council members may be

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[5] (FOOTNOTE CONTINUED)
the States. Federalist Papers No. 16 Hamilton). Widespread state appointment of federal officers would obviously undermine this purpose.

[6] The statement in the text is subject to one qualification. The Act defines the "region" serviced by Bonneville to include portions of Nevada, Utah, Wyoming and California. 16 U.S.C. § 839a(14). (The first three states

viewed as officers of the state whose governors appointed them or of an agency created by interstate compact, rather than federal officers, despite the significant federal authority they may exercise.

The Supreme Court on several occasions has sustained congressional enactments subjecting federal agencies to the operation of state law, incuding the determinations of state administrative agencies. California v. United States, 438 U.S. 645 (1978) (federal dam subject to state water resources agency); Hancock v. Train, supra, 426 U.S. 167 (federal facility

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6 (FOOTNOTE CONTINUED)
are specifically mentioned; portions of California are included under the definition in 16 U.S.C. § 839a(14)(B).) To the extent that the Council has significant authority over Bonneville's actions affecting persons outside the states from which Council members were appointed, it becomes difficult to argue that the Council members are state or regional, rather than federal, officers for purposes of the Appointments Clause.

subject to state air pollution regulations); FERC v. Mississippi, 456 U.S. 742 (1982) (state utility commission administers federal regulations regarding utility rate structures and cogeneration).

The Appointments Clause question, then turns on whether the Council members are state (or interstate compact) officers [21] exercising the kind of authority over a federal agency that the Supreme Court has sustained in the case of state water resource agencies, air pollution agencies, and utility commissions, rather than "officers of the United States" under the Appointments Clause.

On the one hand, it could be argued that the Council differs from the typical state or interstate compact agency, in the sense that the only significant authority the Council exercises is to constrain the actions of a federal agency, and this authority derives exclusively from the

Northwest Power Act.[7] By contrast the state agencies involved in California v. United States, Hancock v. Train and FERC v. Mississippi, administered state regulatory programs, based on state law, governing the legal rights and obligations of state residents.[8] Thus the

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[7] The state statutes authorizing appointments to the Council do not give the Council members any state substantive law to administer. (These statutes are set forth in the Addenda to the Amicus Brief of the Pacific Legal Foundation.) The Council's authority to adopt a conservation plan--and any authority it may have as a result to impose constraints on federal agencies--flows exclusively from the Northwest Power Act. The situation is thus different from cases in which this Court has held Bonneville subject to state direction under state laws and regulations of general applicability controlling the siting of energy facilities and environmental standards. Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981); State of Montana v. Johnson, 738 F.2d 1074 (9th Cir. 1984).

[8] Similarly, the substantive terms of interstate compacts are often enacted by the legislatures of the party states, so that the officers of the compact agency are administering a statute that is the substantive law of the state, as well as federal law by virtue

[22] members of these agencies were clearly state rather than federal officers. This conclusion is less clear in the case of officials whose sole authority to impose legal obligations is with respect to a federal agency, and is derived exclusively from a federal statute.

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[8] (FOOTNOTE CONTINUED)

of the compact approval of Congress. See, e.g., Texas [22] v. New Mexico, No. 65 Orig. (June 7, 1984), slip op. 9, 12-13; Cuyler v. Adams, 449 U.S. 438 (1981). The officers of such a compact agency may be more akin to state officers than federal officers for purposes of the Appointments Clause. For example, the substantive terms of the interstate compacts cited in the amicus brief of the National Governors Association (at 25) have all been adoted by the Oregon Legislature. Or. Rev. Stat. §§ 542.610-.630 (Klamath River Basin Compact); Or. Rev. Stat. § 469.930 (Northwest Interstate Compact on Low-Level Radioactive Waste Management); Or. Rev. Stat. § 507.040 (Pacific Marine Fisheries Compact); Or. Rev. Stat. § 483.875 (Multi-State Highway Transportation Agreement). The other compact cited, the Oregon-Washington Columbia River Fish Compact, Or. Rev. Stat. § 507.010, is an agreement not to change relevant state statutes without mutual consent. In all these cases, unlike the Council's situation, state substantive law is involved.

On the other hand, while the Council does not exercise regulatory jurisdiction over residents of the four Pacific Northwest states, it does have the important function of recommending conservation standards which Congress hoped would be adopted by states and localities within the Pacific Northwest region. Thus in an indirect way, the Council's recommendations could affect state regulation of Pacific Northwest residents. Also, the Council's responsibilities are regional rather than national in nature; where regional rather than national responsibilities are involved, it can be argued [23] that there is room in our federal system for Congress to give state-appointed officials authority to impose constraints on the operations of a federal agency.[9] For this reason, the Council members could be

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[9] But see n. 6, supra.

viewed as state or interstate compact officers rather than federal officers, despite the significant authority they may exercise under two provisions of the Northwest Power Act.

III. THE COURT SHOULD NOT REACH CONSTITUTIONAL QUESTIONS RAISED BY STATUTORY PROVISIONS NOT INVOLVED IN THE CASE.

As we have shown, the only significant Appointments Clause issue involving the Council is raised by two statutory provisions that do not affect these petitioners. "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21 (1960). Accord: Warth v. Seldin, 422 U.S. 490 (1975).

Moreover, we have very little reason to believe that the two provisions of the Act which do raise Appointments Clause issues will give rise to controversy in the foreseeable future. As noted, these provisions involve imposing restraints on sales to industrial customers and on additional resource acquisition. Both provisions are likely to become controversial, if at all, [24] only in the future. The region is now in a situation of power surplus, which Bonneville expects to exist for a number of years. There is simply no reason for the Court to reach out to decide the constitutionality of statutory provisions which are not now in controversy and are unlikely to generate controversy within the foreseeable future.[10]

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[10] Under section 4(b) of the Act, 16 U.S.C. § 839b(b), if "any substantial function or responsiblity of the Council" were held unlawful by reason of the Appointments Clause, the Council would

Congress has specifically designated the Council's adoption of a conservation plan (including model conservation standards) as final action subject to judicial review, and has required suits to obtain judicial review of the plan to be filed within 60 days of publication. 16 U.S.C. § 839f(e)(1), (5). Under this statutory provision, the Court is required to take the case. However, Congress did not specify what constitutional issues have to be decided as part of a challenge to the plan. [25] While Congress expected

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10 (FOOTNOTE CONTINUED)
have to be reconstituted as a federally-appointed body. Thus petitioners in this case could benefit if provisions of the Council's statutory authority which do not affect them were held to invalidate the state-appointed Council. Nothing in section 4(b), however, indicates a congressional intent to alter the usual rule that a person must be affected by a statutory provision to challenge it. The statutory provisions that raise a significant issue under the Appointments Clause do not affect these petitioners.

challenges to the constitutionality of the Council, it left to the courts the question of who has standing to raise the constitutional issue. Since justiciability of the case would be in serious question absent the judicial review provision of the statute, the Court should decide no more than is necessary to comply with that provision, refraining from decision of a constitutional question under the Appointments Clause that does not implicate petitioners' rights.

The justiciability question is raised by the fact that the Council's model standards have no direct legal

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10 (FOOTNOTE CONTINUED)
Although the language in section 4(b) of the Act changed during its consideration, Congress consistently declared its preference for a state-appointed, over a federally-appointed, Council. See H. Rep. No. 976, Part II, supra, at 40-41, 6038-39; 126 Cong. Rec. S14697 (Nov. 19, 1980) (remarks of Sen. McClure); 126 Cong. Rec. H 9853 (Sept. 29, 1980) (statement of Rep. Swift). See also 16 U.S.C. § 839h.

impact on anyone. The Act specifically reserves to the states and their political subdivisions the right to develop and implement their own conservation programs. 16 U.S.C. § 839g(a). Only if a state or locality enacts a law requiring buildings to meet conservation standards will petitioners be subject to binding standards; and when that happens, the standards will be those of the enacting jurisdiction, not the Council.

In short, the Council's model standards may result in legal obligations being imposed on petitioners, depending on the outcome of two sets of decisions by other bodies: (1) state and local legislatures who might be persuaded to adopt the model standards, and (2) Bonneville, which might decide to impose a surcharge in areas where they are not adopted.

The fact that state and local legislatures might be persuaded to adopt the

model standards does not create a ripe controversy. In this respect, the Council is no different from [26] the Commisioners on Uniform State Laws; their recommendations may be very persuasive with state legislatures, but they do not present a case or controversy. The courts do not sit to affect the outcome of an ongoing political process.[11]

Nor would the fact that Bonneville might impose surcharges in areas that

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[11] Energy conservation standards have considerable political appeal, entirely apart from what the Council may recommend. Indeed, as explained in the Amicus Brief of the California State Energy Resources Conservation and Development Commission, California adopted standards similar to the Council's model standards in 1981, two years before the Council's recommendation. Tacoma's Amicus Brief explains that these standards have been beneficial for utilities and homeowners in that City; if so, it seems doubtful that Tacoma would repeal the standards it has adopted even if this Court were to invalidate the model standards. Thus, "there is no reason to believe that the remedy sought will cure the plaintiffs' alleged injuries." Bowker v. Morton, 541 F.2d 1347, 1350 (9th Cir. 1976).

do not adopt the model standards normally constitute a basis for justiciability. The Act provides only that the Council may "recommend" surcharges and that Bonneville "may" adopt the recommendation. 16 U.S.C. § 839b(f)(2). Indeed, Congress rejected an amendment that would have required Bonneville to follow the Council's recommendation, on the basis that "[t]his change would raise constitutional problems because the council * * * * cannot, under the constitution, require a Federal agency to take action of this nature." 126 Cong. Rec. H10525 (daily ed. Nov. 12, 1980) (statements of Rep. Markey and Dingell). Where a recommendation will have no legal impact unless there is a further discretionary administrative decision, the recommendation does not normally present a justiciable [27] controversy--even in situations where the existence of the recommendation has a present economic impact.

Boating Industry Ass'ns v. Marshall, 601 F.2d 1376 (9th Cir. 1979); Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983).

The most that can be said is that the model standards might encourage other parties to take action which might injure petitioners. That was also the situation in Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), where indigents challenged an IRS Ruling substantially reducing the medical care hospitals were required to provide them to maintain favored tax treatment. While acknowledging that the Ruling "had 'encouraged' hospitals to deny services to indigents," the Court concluded that "it does not follow * * * that the denial to access to hospital services in fact results from [the] new Ruling, or that a court-ordered return by [IRS] to their

previous policy would result in these respondents' receiving the hospital services they desire." 426 U.S. at 42. Similarly here, it does not follow that Bonneville will impose surcharges, or that states and localities will make their decisions based on the legal question decided in this case rather than on the very considerable merits of the conservation standards themselves.[12]

[28] The precedents that we have discussed involve the concepts of standing and ripeness, which serve both as a

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[12] See n. 11, supra.
[28] It might be added that even if states and localities are influenced by a desire to avoid threatened surcharges, they can avoid both the surcharges and the model standards--i.e., both sources of petitioners' alleged injury--by adopting other measures which produce comparable savings. One example would be innovative rate designs to encourage comparable energy savings. 16 U.S.C. § 839b(f)(2). Such rate designs would encourage homeowners to demand energy-efficient homes; but the encouragement of consumer demand for such homes can hardly be considered a legal (or even economic) injury to petitioners.

"constitutional limitation on judicial power" as well as a "self-imposed discretionary doctrine." Boating Industry Ass'ns v. Marshall, supra, 601 F.2d at 1380. In most situations, there is no statute requiring that a particular administrative action be subject to judicial review; thus it is not clear where the "constitutional limitation" ends and the "self-imposed discretionary doctrine" begins. There is such a statute in this case. However, compliance with the judicial review statute does not require the Court to decide the constitutionality of statutory provisions not necessarily involved in the case. Since these provisions have no effect now, and it is speculative whether they will ever be drawn into controversy, there is not a ripe controversy with respect to those provisions. In light of the exclusively statutory basis for justiciability and the

normal judicial reluctance to decide constitutional questions, we urge the Court not to address the Appointments Clause implications of any [29] provisions of the statute other than those relating to model conservation standards and surcharges.

APPENDIX Q

No. 83-7585
IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE MASTER BUILDERS ASSOCIATION; HOMEBUILDERS ASSOCIATION OF SPOKANE, INC.; NATIONAL WOODWORK MANUFACTURERS' ASSOCIATION; FIR & HEMLOCK DOOR ASSOCIATION; SHELTER DEVELOPMENT CORPORATION; CLAIR W. DAINES, INC.; CONNER DEVELOPMENT COMPANY; DONALD N. McDONALD; SEATTLE DOOR COMPANY, INC.; HOMEBUILDERS ASSOCIATION OF WASHINGTON STATE,
Petitioners,
vs.
NORTHWEST POWER PLANNING COUNCIL,
Respondent,
UNITED STATES OF AMERICA,
Intervenor-Respondent.

REPLY BRIEF OF RESPONDENT NORTHWEST POWER PLANNING COUNCIL TO BRIEF OF THE UNITED STATES AS INTERVENOR

AARON M. PECK
STEVEN G. HARMAN
McKenna, Conner & Cuneo
Twenty-Eighth Floor
3435 Wilshire Bouelvard
Los Angeles, California 90010
(213) 739-9100
OF COUNSEL:
LAURENCE H. TRIBE
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

FRANK W. OSTRANDER
General Counsel
JANET C. HANSON
Associate Counsel
WILLIAM R. COOK
Associate Counsel
Northwest Power Planning Council
850 S.W. Broadway, Suite 1100
Portland, Oregon 97205
(503) 222-5161

Attorneys for Respondent Northwest Power Planning Council

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[5]B<u>The Council's Adoption of Its Plan, Including Model Conservation Standards, and Its Recommendation that BPA Impose a Surcharge on Electricity Sold to Jurisdictions that Fail to Implement such Standards, Have Significant and Continuing Legal and Practical Consequences for BPA and Other Federal Agencies. Accordingly, the Court Must Decide Whether the Council Members Are Federal Officers.</u>

The Intervenor argues that the Act and the Council's twenty-year energy plan ("the Plan") adopted thereunder have had no operative impact. (Brief of Intervenor, pp. 8-11, 25-26.)[5] This is

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5 While the language used by the Intervenor to characterize the legal significance of the Council's conduct varies, it includes, for example the statement that "[t]he Council's powers with respect to model conservation standards are . . . of an investigative and informative nature. . . . " (Brief of Intervenor, p. 11.) The Intervenor acknowledges that two of the functions performed by the Council entail the exercise of "significant authority." (Brief of Intervenor, pp. 12-23.) While the acknowledgment is correct as far as it goes, it is incomplete. In reality, <u>many</u> functions performed by the Council have significant legal consequences and thus would entail the exercise of "significant authority." <u>See</u>, <u>e.g.</u>, 16 U.S.C. §§ 839b; 839c; 839d.

incorrect. In fact, both the appointment of the Council under 16 U.S.C. § 839b(a) and the actual promulgation of the Plan by the Council have had significant operative effects on the Petitioners and others.

The core of the Petitioners' complaint is that the Plan itself predictably inceases the cost of new housing, both absolutely and relative to existing housing, as a direct consequence of the altered legal situation brought about by the Council's action. The Council has exercised several powers affecting this concern. It can issue and has issued model conservation standards and has recommended that surcharges be imposed on customers of BPA in jurisdictions which do not adopt the standards or implement comparable conservation measures. See 16 U.S.C. §839(b)(f); [6]Plan, Vol. I, p. 10-9. Upon, and only upon, the Council's recommendation, BPA may implement such sur-

charges using a methodology outlined by the Council.[6] Id.

In addition, the Council's Plan allows the acquisition of energy resources, if needed, including conservation, in excess of 50 average megawatts of generating capacity or conservation potential for a period of more than 5

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[6] The Intervenor's suggestion that BPA could establish its own system of credits and surcharges under its § 839e ratemaking power is incorrect. Section 839e contains various provisions, the essence of which is that rates are to be based on cost. The fact that § 839e(e) authorizes BPA to set peak or seasonal rates reflective of the costs of marginal capacity or the higher costs of power in the low-water season does not imply that the Administrator can impose regulatory surcharges or credits to enforce his or her own energy plan, outside of the specific provisions of the Act. Thus, in the passage from Central Lincoln Peoples Utility Dist. v. Johnson, 735 F.2d 1101, 1122 (9th Cir. 1984), cited by the Intervenor (Brief of Intervenor, p. 10, n. 2), the court was approving rates reflective of the costs of power in the low-water season, not some regulatory rate scheme. This is not the surcharge contemplated by section 4(f)(2) of the Northwest Power Act, 16 U.S.C. § 839b(f)(2).

years. In that case, BPA is authorized, after a finding by the Council of consistency with the Plan, to expend funds required for such acquisitions. Otherwise, BPA must seek an act of Congress for the expenditure. See 16 U.S.C. § 839c. Billing credits for BPA customer-initiated generating resources may be awarded only if the resources are consistent with the Plan, in which case credits must be awarded. 16 U.S.C. § 839c(h). The promulgation of the Plan terminates the authority of BPA to award credits for resources solely on the basis of criteria in § 839b(e). Id.

Furthermore, BPA is required under § 839d(a)(1)(C) to take action "aiding the Administrator's customers and governmental authorities in implementing model conservation standards" such as those in issue here. Section 839d(a) also provides generally that "The Administrator shall

acquire such resources through conservation, implement all such conservation measures, and acquire such renewable resources which are installed by a residential or small commercial consumer to reduce load, as the Administrator determines are consistent with the plan. . . ." [7]. Thus, it is clear that the appointment of the Council and the promulgation of the Plan have had several operational legal consequences. The only conservation standards that may be enforced through surcharges are those of the Council. BPA now may not enforce its own standards through the rate surcharge, nor may it appoint an alternative council capable of promulgating other standards. BPA may now grant billing credits only in accordance with the Plan.[7]

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[7] Moreover, even though the Council action regarding surcharges is only a recommendation, BPA has an obligation, at a minimum, to take such a recom-

Moreover, because the model standards are the conerstone of the Council's Plan, the Council, in addition to recommending that BPA impose a surcharge if necessary, has included a broad range of measures in the Plan to ensure that widespread implementation of the standards does in fact occur. See Plan, Vol. I, p. 10-10, 10-17; Action Items 2.3-2.10, 12.1. Since the adoption of the Plan in April, 1983, BPA --consistent with 16 U.S.C. § 839d (a)(1)(C) -- has in fact undertaken implementation of those measures.[8]

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footnote 7 continued

mendation very seriously rather than to lightly discard it as though it were merely the suggestion of some study commission. Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 103 S. Ct. 2856 (1983) (National Highway Traffic Safety Administration disregarded its statutory duty in revoking passive restraint requirements without providing good reason).

[8] The action items in the Plan which BPA is implementing include the following:

footnote 8 continued

- "Develop a consistent procedure for certifying compliance with these model standards. . . . " Plan, Action Item 2.3.

- "Develop a procedure to review and evaluate alternative plans to achieve comparable savings. . . . " Plan, Action Item 2.4..

- "Develop and implement an education program regarding the provisions of these model standards for builders, architects, designers, real estate appraisers, code officials, and lending institutions. This program shall be in place and operating by January 1, 1985 and shall be offered throughout the region." Plan, Action Item 2.5

[8] "Assist the U.S. Department of Housing and Urban Development to develop and adopt electric energy-efficiency standards for manufactured housing in the Pacific Northwest. The standards should be cost-effective for the region and economically feasible for owners of manufactured housing. To the extent practicable, these standards should be consistent with the standards in this section for other types of construction." Plan, Action Item 2.6.

- "Provide technical and financial assistance to the housing industry (including builders, lenders, appraisers, etc.) for the implementation of a uniform regionwide energy-

footnote 8 continued

efficiency rating system for new residential buildings. This rating system should be similar to that used by the Environmental Protection Agency to provide consumers with information about automobile fuel efficiency. The rating system should be usable by the homebuilding and lending industry and potential home buyers to estimate future use of electricity and qualification for home loans. This rating system should be consistent with that used for existing residential buildings. (see Bonneville action 1.9). This system shall be fully implemented on or before January 1, 1986." Plan, Action Item 2.7.

- "Develop and implement a program which provides incentives for meeting these model standards in residential buildings for which building permits are issued before January 1, 1986. The program shall be designed to result in at least 25 percent of the new residential buildings being built to the Council's model standard between January 1, 1984 and January 1, 1986. This program shall include:

  - o Certification by the local utility, local government, or by independent appraisers of houses which meet or exceed the applicable model standard.

  - o A public education and marketing program which emphasizes the energy saving features and value of houses that achieve the model standard.

footnote 8 continued

- o Efficiency awards to builders of houses which meet or exceed the applicable model standard." Plan, Action Item 2.8.

- "Develop and initiate a program to provide financial incentives to homeowners where governmental entities have adopted and enforced the model standard, or a qualifying alternative plan, prior to January 1, 1986. The incentives provided in this program should be based on the estimated amount of electric energy to be saved by the dwelling (compared to an equivalent dwelling built to current code) between the time it receives its final certificate of occupancy and January 1, 1985. The incentive payment should be set at 4.0 cents per kilowatt-hour saved." Plan, Action Item 2.9.

- "Pay for the incremental cost above that required to meed current code for a sample demonstration of houses built to the model standards. This program shall include:

[9] o A sample of at least 1,000 single-family and 200 multi-family buildings which are separately metered for space heating, waste heating, and other appliance uses. The buildings should be located in proportion to population distribution across the region. The Council will consider a reduction in the sample size upon a demonstration that statistically significant results can be obtained with a smaller number of units.

footnote 8 continued

- o A measurement of the level of air infiltration and indoor air quality for the model houses.
- o Occupant data, including the type and number of appliances owned, family size, use of wood heat, thermostat settings, indoor air temperature, and other information determined in consultation with the Council.
- o A control group of comparable buildings built to current code or practice.

These demonstration houses shall be included in the number of houses built to the Council's model standards between January 1, 1984 and January 1, 1986, under the incentive program provided in action 2.7.

The program measures described in actions 2.3, 2.5, and 2.8 shall be carried out in cooperation with state and local governments, utilities, trade and professional associations, and other interested parties." Plan, Action Item 2.10.

- Develop and implement a program to reimburse state and local governments for the full incremental cost of adopting and enforcing all model conservation standards under this plan, so long as enforcement of the model conservation standards program as a whole is cost-effective. This program shall be in place and operating by Janaury 1, 1985 and shall be offered throughout the region. Plan, Action Item 12.1.

[9] BPA is implementing these measures through a multimillion dollar program managed, in part, in cooperation with each of the states of the Northwest.[9] In Washington State, for example, consistent with Action Item 2.10 in the Plan, there are approximately 250 demonstration homes being built to the model standards. [10] Similar efforts are underway in Oregon, Montana and Idaho. By means of Action Item 2.10 alone, residences demonstrating the construction and use of the model standards will soon be available to consumers, governmental officials and the building industry throughout the Northwest.

As a result of these items in the Council's Plan and BPA's implementation

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[9] BPA has budgeted a total of $11.6 million in fiscal year 1985 to be spent in support of adoption and enforcement of the model standards. Issue Alert: BPA Revises Its Strategy for Future Resources, Bonneville Power Administration, Jan. 1985.

of them, the model standards are now having a significant impact in the Northwest. The City of Tacoma, Washington (the fourth largest city in the Northwest, Hammond, The Whole Earth Atlas 247 (1980)), as described in its brief amicus curiae, is at this very moment implementing the standards. Other jurisdictions have adopted or are now in the process of adopting or considering the standards through building codes or alternative measures. The City of Seattle, Washington (the largest city in the Northwest, Id.), for example, has opened public comment on its proposed adoption of an alternative plan that it estimates will save an amount of electric energy equivalent to that which would be obtained by the model standards. Proposed Revisions to the Seattle Energy Code, Seattle Dept. of Construction and Land Use, Jan. 15, 1985. Administrative proceedings are also

underway before the building code agency within the Oregon Department of Commerce. Oregon Building Codes Division's Response to the Northwest Power Planning Council's Model Conservation Standards (draft), Building Codes Div., Oregon Dept. of Commerce, Jan. 3, 1985. Bills adopting the standards are pending in the legislatures of Oregon and Washington. H.B. 2357 (Oregon); S.B. 4268, H.B. 948 and H.B. 1114 (Washington).

When and whether the model standards or equivalent measures will be adopted in every jurisdiction in each of the four states is at this time a matter for speculation. Whether a surcharge by BPA will in fact be imposed is at this time also [11] a matter for speculation.[10] The

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[10] Ironically, there is nothing in the Intervenor's brief to suggest that BPA will refuse to impose the recommended surcharge. Moreover, the Intervenor explicitly acknowledges "the very considerable merits of the conservation measures themselves". (Brief of Intervenor, p. 27.)

mere possibility of a surcharge may be an important additional cause for implementation by many jurisdictions, as is the possibility of financial incentives for those who adopt. But what is not speculative is that the Council has adopted the Plan, incorporating the model standards and a broad range of measures to ensure their implementation, and indeed that members of the Petitioners who build homes in at least one major city in the Northwest -- Tacoma -- must comply with the standards today. Moreover, those of the Petitioners who build housing materials must plan new products now for the further implementation of the standards in the future. See Second Amended Petition for Review, October 6, 1983, at 8.

It cannot be said, then, that legal relationships have not been affected in a manner touching the interests of the Petitioners. BPA has been subjected to

constraints and obligations leading it to enforce the model standards as put forth by the Council. That BPA has not yet engaged in enforcement is immaterial, for such action is not a prerequisite to suit.

Indeed, the Intervenor acknowledges that the Council's power to limit the acquisition of "major resources" (i.e., those equivalent to 50 average megawatts of generating capacity for a period exceeding 5 years) probably is a "significant authority" (Brief of Intervenor, p. 13), but the Intervenor suggests that this authority has not yet been exercised. This latter statement is simply incorrect. With respect to any proposed acquisition of a major resource, BPA is under a current legal obligation either to make the acquisition consistent with the Plan or else to seek an [12] act of Congress for the acquisition. The Council need not

take further action to implement this restraint.[11]

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[11] Moreover, the Intervenor reads too much into § 839f(b). It suggests that this provision grants the BPA Administrator broad discretion in balancing consistency with the Plan with the policies of §§ 839-39h. (Brief of Intervenor, p. 15, n. 4) This does not seem to be a fair reading of the statute. While § 839f(b) does provide that the Administrator shall discharge his executive and administrative functions in accordance with the policies of the Bonneville Project Act of 1937 (16 U.S.C. § 832 et seq.) and of §§ 839-39h of the Northwest Power Act, this section does not imply that the directives elsewhere that the Administrator's actions "shall be consistent with the plan" (16 U.S.C. § 839b(d)(2)) are subject to a broad balancing test. Rather, the only fair reading is that the Administrator shall obey the consistency requirements in addition to the policies of the 1937 Bonneville Project Act.

The Council also disagrees with any suggestion by the Intervenor that BPA can avoid its obligtion to protect fish and wildlife based upon "its responsibility to provide an adequate, efficient, economical and reliable power supply . . ." (Brief of Intervenor, p. 15.) See Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466 (9th Cir. 1984); Forelaws on Board v. Johnson, 743 F.2d 677, 682 (9th Cir. 1984.)

C. The Appointments Clause Issue Is Ripe for Adjudication Now.

This court cannot avoid determining whether Council members are federal officers on the ground that this proceeding does not involve the exercise of significant authority by the Council. As demonstrated above, the actions already taken by the Council have significant current legal consequences for the Petitioners and others. These consequences require decision of the Appointments Clause issue without delay.

The actions taken thus far by the Council meet the relevant tests of ripeness and justiciability enumerated by the Supreme Court in Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978), for adjudication of constitutional challenges: 1) The alleged harms to Petitioners are traceable to the Council's exercise of authority in adopting the

Plan, including in particular the model conservation standards and Plan measures for implementation; 2) The alleged harms caused by the standards and the threat of their regionwide adoption would be redressed by the relief sought by the Petitioners. See Duke Power at 77-81. [13] Early review is especially appropriate where, as here, the issue posed is predominately or purely one of law. Pacific Gas & Electric v. State Energy Resources Conser. and Devel. Comm'n., 103 S.Ct. 1713, 1720 (1983); Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). No further factual development will significantly aid the court in its consideration of the legal question of the Council's constitutionality.

Nor does the Intervenor offer any reply to the fact that the Petitioners must raise their challenge now or be forever barred. Congress, desiring that

clouds on the authority of the Council be settled promptly so as to encourage voluntary compliance, has mandated that suits challenging the Plan be brought within 60 days after notice of the challenged final action is published in the Federal Register. See 16 U.S.C. § 839f (e)(5). The Petitioners cannot wait for the full tale to unfold. Nor is there any reason why they should be required to wait. Additional future actions by BPA or by the political jurisdictions or utilities in the region are not of consequence to the determination of this Appointments Clause challenge, which needs to be decided now.

. . . .

APPENDIX R

No. 83-7585

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE MASTER BUILDERS ASSOCIATION; HOMEBUILDERS ASSOCIATION OF SPOKANE, INC.; NATIONAL WOODWORK MANUFACTURERS' ASSOCIATION; FIR & HEMLOCK DOOR ASSOCIATION; SHELTER DEVELOPMENT CORPORATION; CLAIR W. DAINES, INC.; CONNER DEVELOPMENT COMPANY; DONALD N. McDONALD; SEATTLE DOOR COMPANY, INC.; HOMEBUILDERS ASSOCIATION OF WASHINGTON STATE,

Petitioners,

vs.

NORTHWEST POWER PLANNING COUNCIL,

Respondent,

UNITED STATES OF AMERICA,

Intervenor-Respondent.

PETITIONERS' REPLY BRIEF

John W. Hempelmann
Paul Sikora
Michael B. King
DIAMOND & SYLVESTER
400 Hoge Building
Seattle, Washington 98104
(206) 623-1330

Attorneys for Petitioners

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[22]2. The Council's Appointment by State Governors Violates the Framers' Expressed Intent Regarding the Appointments Clause and the Separation of Powers.

The Council claims its appointment by State governors is consistent with the Framers' understanding of the separation of powers, because "legislation and appointment remain in separate hands . . . ." Resp. Br., 63 (citation omitted). The Council is wrong.

The Framers explicitly rejected a proposal to dilute the Executive's appointment power by permitting the Legislative branch to authorize State governors to appoint those exercising substantial authority pursuant to the laws of the United States. When the Constitutional Convention debated the Executive's appointment power, Edmund Randolph of Virginia expressed concern about its "formidable" nature, and suggested the

Legislature should be "left at liberty" to refer appointments "to some State Authority . . . in some cases." M. Farrand, 2 Records of the Federal Convention 405 (1911) ("Farrand") at 405. John Dickinson of Delaware then moved, with Randolph seconding, that the appointments power be amended to read "except where by law the appointment shall be vested in the Legislatures or Executives of the several States." 2 Farrand at 406. Roger Sherman of [23] Connecticut, however, objected to permitting State legislatures to make appointments. Id. at 406. Dickinson and Randolph then agreed to amend their proposal by limiting the Legislative Branch to vesting appointment power in State executives alone. Id. at 406. This modified proposal, squarely presenting the issue of State governor appointment of those exercising substantial authority pursuant to the laws of the United States,

was severely criticized, and decisively rejected. See id. at 406, n.12, 407, n.12, 419, n. 15. See also, 26, infra.

This rejection was consistent with the Framers' express understanding of the separation of powers. They believed "power is of an encroaching nature," and an "adequate defense" therefore "indispensably necessary for the more feeble . . . against the more powerful members of the government." THE FEDERALIST NO. 48 at 332, 333.[15] In particular, they

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[15] Federal courts accord THE FEDERALIST great deference when passing on separation of powers matters. See United States v. Woodley, 751 F.2d 1008, 1010 n. 3 (9th Cir. 1985) (en banc) (upholding validity of recess appointments of Article III judges) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 120, 187, 5 L. Ed. 257 (1821) (opinion by Marshall, C.J.)) However, the Homebuilders note the relevant papers of THE FEDERALIST must be read together. For example, numbers 47 through 51, by James Madison, constitute an extended meditation on the separation of powers. Madison himself notes how each paper ir the series builds on what went before. See THE FEDERALIST NO. 47 at

believed this required protecting the Executive and Judicial Branches against Legislative ambition, as they had concluded, from experience under the post-Independence State constitutions, that the greatest threat to the separation of powers lay in "the tendency of republican governments . . . to an aggrandizement of the legislative, at the expense of the other departments. . . ." THE FEDERALIST NO. 49 at 341.[16]

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footnote 15 continued

331; NO. 48 at 332, 338; NO. 49 at 343; NO. 50 at 344; NO. 51 at 347. See also Nixon v. General Services Adminstrator, 433 U.S. 425, 511 n. 6, 97 S. Ct. 2777 (1977) (Burger, C.J., dissenting).

[16] The Framers saw that, "[t]he legislative department [was] every where extending the sphere of its activity, and drawing all power into its impetuous vortex. . . . " THE FEDERALIST NO. 48 at 333. They wanted to avoid the mistake of the State constitution authors, who, reacting to the abuses of an "hereditary

[36]4. The Council's Violation of the Separation of Powers Presents a Justiciable Controversy.

The United States contends this Court should not reach the Appointments Clause issue, claiming: (1) The Act's provisions affecting the Homebuilders do not raise an Appointments Clause issue; (2) the Homebuilders lack standing to make an Appointments Clause claim; (3) any Appointments Clause claim in not ripe for review. See U.S. Br., 17, 23-28. The United States is wrong.

a. The Act's provisions affecting the Homebuilders Raise an Appointments Clause Issue.

The Council action affecting the Homebuilders is the Plan's promulgation,

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footnote 16 continued

[executive]," had forgotten the equally great danger of "legislative usurpation . . . ." Id. See also Buckley, 424 U.S. at 129 (citing Framers' fear "that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches. . . .").

particularly it calls for adoption of the new housing conservation standards. The BPA must conform to the Plan, unless the Act "specifically provide[s] . . .otherwise . . . ."[37] 16 U.S.C. § 839b(d)(2). The Act does not "provide otherwise" regarding conservation measures, such as the new housing conservation standards. See 16 U.S.C. § 839d(a)(1), (b)(5).[35]

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[35] The BPA has discretion to acquire non-major resources, inconsistent with the Plan, if the BPA determines those resources would be consistent with the Act. See 16 U.S.C. § 839d(b)(1). However, this discretion does not extend to refusing to acquire resources through conservation. The discretion to acquire a resource does not logically include the discretion to refrain from acquiring a resource. The Act makes this clear: "Notwithstanding any acquisition of resources pursuant to this Section [839d(b)], the [BPA] Administrator shall not reduce his effort to achieve conservation . . . pursuant to Subsection [839d](a)(1)] . . . ." 16 U.S.C. § 839d(b)(5). 16 U.S.C. 839d(a)(1) requires the BPA Administrator to acquire "all" conservation measures consistent with the Plan.

The BPA therefore has a legal duty under the Act to acquire all new housing conservation measures mandated by the Plan.[36] The Council's action therefore constitutes the exercise of substantial authority pursuant to the laws of the United States, and raises an Appointments Clause issue. See, e.g., Plan, Vol. I, Table 10-1; Buckley, 424 U.S. at 126; Section II. H.1, supra.

b. The Homebuilders have standing to make an Appointments Clause claim.

Standing under Article III requires a party invoking a court's authority to show: (1) an actual or threatened

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[36] Moreover, the Act authorizes the Council to compel the BPA to take final action on any de facto refusal to comply with the Plan. See 16 U.S.C. § 839b(j). The Council may then challenge this final action before this court. See 16 U.S.C. § 839f(e). The fact the Council has yet to force the BPA to comply with the Plan does not lessen the BPA's duty to comply, a duty that arose upon promulgation of the Plan.

injury; (2) fairly traceable to the challenged action; (3) likely to be redressed by a favorable decision. Preston v. Heckler, 734 F.2d 1359, 1364 (9th Cir. 1984) (finding standing). See Duke Power Co. v. Carolina Env. Study Group, Inc., 438 U.S. 59, 72, 74, 98 S. Ct. 2620 (1978) (finding standing). The Homebuilders satisfy these requirements.

The Homebuilders have suffered actual and threatened injury, fairly traceable to the Council's action. Several local governments have adopted the new housing conservation standards, and some state and other local governments are considering doing so. Home builders therefore face a significant business loss, as increased housing costs may drive thousands of families from the housing market, while wood door and window manufac[38]turers face a significant business loss, because of the elimination of the market for many

of their products, and the high cost of developing substitutes. See Petition for Review at 12; Second Amended Petition for Review at 8. Moreover, these injuries are likely to be redressed by a favorable decision, because it would render the Plan's new housing conservation standards a nullity.[37]

c. The Homebuilders' Appointments Clause claim is ripe for review.

Ripeness traditionally turns on "the fitness of the issues for judicial deci-

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[37] The Homebuilders' standing is not affected by the possibility that a successor Council might reissue the standards, or that the BPA might acquire resources through them irrespective of the present Council's fate. Standing jurisprudence does not require a party, seeking to invoke federal jurisdiction, to negate such speculative and hypothetical possibilities in order to demonstrate the likely effectiveness of judicial relief. Duke Power Co., 438 U.S. at 77-78 (standing to challenge constitutionality of Price-Anderson Act's limitation on liability of private utilities for nuclear power plant accidents not affected by the fact the federal government might have built such plants on its own absent the liability limitation).

sion" and "the hardship to the parties of withholding court consideration." Pac. Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n., 461 U.S. 190, 200, 103 S. Ct. 1713 (1983) (finding question ripe for review); Montana v. Johnson, 738 F.2d 1074, 1076-77 (9th Cir. 1984) (finding question ripe for review). Both requirements are satisfied here.

First, the Appointments Clause claim is fit for a judicial decision. It gives rise to a straightforward legal issue: May the Council, as appointed, exercise substantial authority pursuant to the Act over the BPA? This court has the necessary facts to resolve it: The Council has been appointed, and has exercised substantial authority pursuant to the Act. See, e.g., Pac. Gas & Electric Co., 461 U.S. at 201 (review appropriate where issue posed is predominantly or purely one of law);

Buckley, 424 U.S. at 115-16 (reversing Court of Appeals) (finding Appointments Clause claim ripe for review) ("since the entry of judgment by the Court of Appeals, the [Federal Elections] Commission has undertaken to issue rules and regulations . . ."); Montana v. Johnson, 738 F.2d at 1076-77 (issue fit for review because "it raises exclusively legal questions"). [39] Second, withholding court consideration would mean hardship to the parties. Some local governments have adopted the Council's standards. While there is uncertainty about whether state and other local governments will do so, the Homebuilders still require relief now, because Builders and materials suppliers must decide today whether to spend money on such things as changing construction techniques and developing new products. Such costs are the stuff of hardships that traditionally warrant prompt court action.

See, e.g. Pacific Gas & Electric Co., 461 U.S. at 200 (holding challenge to California state nuclear power plant moratorium ripe for review) ("To require the [electric power] industry to proceed without knowing whether the moratorium is valid would impose a palpable and considerable hardship on the [industry] . . ."); Montana v. Johnson, 738 F.2d at 1077 (finding suit for declaration that BPA was subject to state certification process for proposed power line ripe for review) ("Montana risks wasting expensive administrative resources if it determines BPA's compliance with its substantive provisions before receiving assurance that [BPA is] require[d] to compl[y].[Footnote ommited.]

I. The Homebuilders Need Not Apply for Attorneys' Fees Until They Win This Case.

The time to apply for attorneys' fees is established by statute - "within

30 days of final judgment." 28 U.S.C. § 2412(B).

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APPENDIX S

No. 83-7585

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE MASTER BUILDERS ASSOCIATION, et al.,
Petitioners,

v.

NORTHWEST POWER PLANNING COUNCIL,
Respondent,

UNITED STATES OF AMERICA,
Intervenor-Respondent.

ON PETITION FOR REVIEW FROM A FINAL ACTION BY THE NORTHWEST POWER PLANNING COUNCIL

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

OF COUNSEL:

HARVARD P. SPIGAL
General Counsel

JAMES O. LUCE
Assistant General Counsel

PAUL S. MAJKUT
Attorney
Bonneville Power Administration
1002 N.E. Holladay
Portland OR 97208

RICHARD K. WILLARD
Assistant Attorney General
JAMES M. SPEARS
Deputy Assistant Attorney General

WILLIAM KANTER
ROBERT V. ZENER
Attorneys, Appellate Staff
Civil Division, Room 3348
Department of Justice
Washington, DC 20530
Telephone:
202-633-4027 FTS

. . . .

[6] The dissent rejected the argument that the Appointments Clause applies only to the separation of powers between Congress and the Executive:

> Congressional authority would be enhanced at the expense of the executive if Congress had the unrestricted power to confer the appointment authority on third parties. To the extent that a governor can appoint a member of an interstate compact agency who would otherwise be subject to the Appointments Clause, the power of the executive is diminished.

Slip opinion dissent at 8.

ARGUMENT

We respectfully urge the Court to modify the opinion to make it clear that a) the powers of the Council at issue in this case do not constitute or affect the exercise of federal executive authority to the extent necessary to implicate the Appointments Clause and b) the Court does not decide the extent of any other power of the Council under the Act, or whether

such power is consistent with the Appointments Clause.

The language of the majority opinion as it presently stands is capable of an interpretation that decides an important constitutional issue not presented under the facts of this case. The Court's generalized constitutional discussion is unnecessary, overly broad, and may raise serious implications for the powers and responsibilities of the Executive Branch. We therefore urge the Court to rule simply that the Council conforms to the Appointments Clause <u>with respect to the purely advisory authorities involved in this case</u>, leaving for another day whether a State-appointed Council may exercise other more [7] significant authority in a manner consistent with the Appointments Clause.

The question of what powers Congress may give to a state or interstate compact agency to affect the operation of a

federal program raises a whole area of first impression in constitutional law. None of the briefs submitted to the panel cited any case involving a federal-state arrangement resembling this one, in which an ongoing interstate-compact planning process "directly overlap[s]" (slip op. at 3) an ongoing program conducted by a federal executive agency.

Nevertheless, the majority opinion does not appear to be limited to the purely advisory authorities involved in this case and could be read to suggest that Congress could properly vest in an interstate compact agency broad authority without raising questions of unconstitutional usurpation of the President's authority over a federal executive agency such as Bonneville. Until a specific occasion presents such a question, however, the the [sic] Court is not in a position to assess whether constitutional

limitations have been transgressed. The opinion should be modified accordingly.

THE COURT SHOULD NOT DECIDE CONSTITUTIONAL QUESTIONS NOT PRESENTED BY THE CASE.

The Court should not decide a significant Constitutional question in a case that does not present it.[3] The only authority of the Council directly involved in this case is its authority to [8]recommend model conservation standards. These standards impose no legal obligations on anyone; the Act specifically reserves to the States and localities full authority to adopt any conservation standards they may choose, or none at all. 16 U.S.C. §839g(a). Similarly, the Council's surcharge recommendation does not compel

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[3] "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21 (1960). Accord: Warth v. Seldin, 42 U.S. 490 (1975).

Bonneville to undertake any particular action. 16 U.S.C. § 839b(f)(2).[4]

The panel majority stated that "one of the principal purposesof [sic] the Council is to represent state concerns about regional problems * * *." (Slip op. at 4). This characterization is, in our view, entirely consistent with what Congress intended and fits the Council actions challenged in this case: The Council promulgated model conservation standards and recommended that Bonneville impose a surcharge in areas where the States or localities have not adopted the model standards or comparable measures, a recommendation that Bonneville is considering.

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[4] In Buckley, supra, 424 U.S. at 137-8, the Court held that powers "essentially of an investigative and informative nature" could be exercised by persons appointed outside the Appointments Clause. The Council's authority to recommend non-binding standards falls squarely within this holding.

We agree with the panel majority that Congress can constitutionally authorize an interstate compact that creates a regional planning agency meeting the above description, and that such an agency may have the planning and recommending powers exercised by the Council to date. We would further agree that Congress may direct a federal agency that, as described by the panel majority, "operate[s] independently" (slip op. at 3) of the regional planning agency, to take the regional agency's plans [9] into account. There simply is no doubt about the constitutionality of the performance of advisory functions relating to federal programs by state or regional agencies.

The question how far Congress may authorize a state or regional agency to direct, rather than advise, a federal program without running afoul of the Appointments Clause is, however, one that

is largely unexplored. Cases holding that Congress may command a federal agency to obey generally applicable state laws or comply with established state processes[5] simply do not establish how far Congress may go in requiring a concededly federal program, like Bonneville, to take direction from state or regional officials rather than the President of the United States or the head of an executive department. The courts have had no prior occasion to consider when, if ever, persons appointed by the Governors have power over the administration of a federal program to such an extent that they must be regarded as actualy wielding federal executive authority in a constitutional sense.

There was no occasion to consider that question in this case. The Council

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[5] California v. United States, 438 U.S. 645 (1978); Hancock v. Train, 426 U.S. 167 (1976).

adopted its Plan and reviews it annually. As the Plan is amended, its contents change. Thus the effect of the Plan on Bonneville's actions will evolve over time. The proper scope and contents of the Plan and its permissible impact on Bonneville's operation have not yet been resolved even as a matter of statutory construction. Any implication that the Council is altogether immune from Appointments Clause challenge, [10] no matter how its powers might later be construed, would be both premature and erroneous.

Questions that may arise in the future from the Council's exercise of its ongoing planning process are simply not ripe for decision in this case. The doctrine of ripeness is designed to ensure that the courts decide cases only when they are "in a posture fit for judicial review." Public Citizen Health Research Group v. FDA, 740 F.2d 21, 30 (D.C. Cir.

1984) (emphasis in original); Peter Kiewit Sons' Inc. v. Army Corps of Engineers, 714 F.2d 163, 168 (D.C. Cir. 1983). Where, as here, the challenge to administrative action asks a court to rule on constitutional issues, the Supreme Court has consistently declined that invitation unless the effects of the allegedly unconstitutional action have been felt by the parties in a concrete way and the necessity for resolving the issue immediately is apparent. See, e.g., Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 569 (1947).

This Court has recognized that even in a nonconstitutional case, a person's standing to assert judicially cognizable injury depends on whether he falls within the zone of interests protected by the legal provision on which he bases his claim. Port of Astoria v. Hodel, 595 F.2d 467, 474 (9th Cir. 1979). In this case,

plaintiffs allege injury resulting from purely advisory action of the Council; they have sustained no injury at all from the Council's exercise of other statutory authorities going beyond the giving of advice and recommendation. Thus they have no standing to challenge the constitutionality of such authorities.

[11] The Council does have authority to recommend surcharges for customers in areas that have not adopted the standards or their equivalent. 16 U.S.C. § 839b(f)(2). However, Congress deliberately chose not to require Bonneville to impose the surcharges, on the ground that such a requirement "would raise constitutional problems because the council * * * cannot, under the Constitution, require a Federal agency to take action of this nature." 126 Cong. Rec. H10525 (Nov. 12, 1980) (statements of Reps. Markey and Dingell). And in any event, petitioners have not

challenged the Council's surcharge recommendation; their sole challenge is to the model standards.

The panel majority, however, stated that it is "immaterial whether [Council members] exercise some significant executive authority over federal activity." Slip opinion p. 10. If this statement were taken to its extreme, there would be no limit to the significant management decisions of a federal agency that could be vested in State or interstate compact officials. Yet it would ignore the history and language of the Appointments clause to conclude that it allows state officials to appoint federal officers.[6]

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[6] The proposition that the Appointments Clause is entirely inapplicable when appointment authority is vested in the States in untenable. When the Clause was under consideration at the Constitutional Convention, a motion to allow authority to appoint officers of the United States to be "vested in the Legislatures or Executives of the several states" was defeated after Gouverneur Morris objected that:

The question when that point is reached [12] remains highly abstract until a specific example of decision-making is before the Court. In considering constitutional challenges, the Court may not "consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." Barrows v. Jackson, 346 U.S. 249, 256 (1953). This rule "frees the Court not only from unnecessary pronouncements on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional applica-

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footnote 6 continued

> This would be putting it in the power of the States to say, "You shall be viceroys but we will be viceroys over you."

II Farrand, The Records of the Federal Convention of 1787, 406, 418-19 (rev. ed. 1966). Before the vote on the motion, Convention struck by consent its reference to the "Legislatures", on the ground that "[i]f this be agreed to it will soon be a standing instruction from the State Legislatures to pass no law creating offices, unless the appointments be referred to them." Id at 406."

tion might be cloudy." United States v. Raines, 362 U.S. 17, 22 (1960).

Solely by way of example, Section 4(h)(10)(A) of the Act, 16 U.S.C. § 839b(h)(10)(A) states in part:

> The Administrator shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this Act and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan, if in existence, the program adopted by the Council under the subsection, and the purposes of the Act.

Depending on the future contents of the Council's Plan and program and the future actions of the Council and the Administrator, the question may arise whether that sentence merely requires the Administrator to take into account the Plan and program along with other "purposes of the Act," or purports [13] to command the Administrator to expend the federal fund

in any manner and in any amount commanded by the Council, so long as the purpose is protection and enhancement of fish and wildlife. Should such a question arise, the United States would expect to urge the Court to construe the section to give the Council an important advisory role, but not to impute to Congress the intention to take the unprecedented step of conferring on persons not appointed in accordance with Article II the power to command the expenditure of federal funds by a federal agency. One important argument for that construction would be the substantial constitutional question of first impression that would be presented if Congress were understood to have vested that power in a person not appointed in accordance with Article II.[7]

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[7] Similar questions may arise under 16 U.S.C. §§839b(d)(2), 839b(i), 839d(a)(1), 839d(b)(1), 839d(b)(2), 839d(b)(3), 839d (c)(1), (2), (3). The United States may be expected to urge a similarly limiting construction of these sections of the Act.

In short, it is not possible to simply read the Act in the abstract and decide whether the authorities it confers implicate the Appointments Clause. Instead, a specific example of decision-making must be before the Court. In this case, the specific decision before the Court is purely advisory and thus does not implicate the Appointments Clause. That is all the Court need decide and, pursuant to the clear instruction of the Supreme Court, all the Court should decide.

APPENDIX T

No. 83-7585

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE MASTER BUILDERS ASSOCIATION; HOMEBUILDERS ASSOCIATION OF SPOKANE, INC.; NATIONAL WOODWORK MANUFACTURERS' ASSOCIATION; FIR & HEMLOCK DOOR ASSOCIATION; SHELTER DEVELOPMENT CORPORATION; CLAIR W. DAINES, INC.; CONNER DEVELOPMENT COMPANY; DONALD N. McDONALD; SEATTLE DOOR COMPANY, INC.; HOMEBUILDERS ASSOCIATION OF WASHINGTON STATE,

Petitioners,

vs.

NORTHWEST POWER PLANNING COUNCIL,

Respondent,

UNITED STATES OF AMERICA,

Intervenor-Respondent.

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
BY
PETITIONERS SEATTLE MASTER BUILDERS
ASSOCIATION, ET AL

John W. Hempelmann
Paul Sikora
Michael B. King
DIAMOND & SYLVESTER
2600 Columbia Center
Seattle, Washington 98104
(206) 623-1330

Attorneys for Petitioners

[3] 1. The Framers Expressly Rejected Giving Congress Power to Delegate the Executive's Appointment Power to the States. The Majority overlooks the critical fact that the Framers expressly rejected the idea that the Appointments Clause is not violated so long as Congress does not arrogate to itself the power to appoint or remove executive officers. On August 24, 1787, the Constitutional Convention voted down an amendment to the Appointments Clause to permit the Congress to delegate appointment power to state governors; a vote noted by both the Petitioners and the United States. M. Farrand, 2 Records of the Federal Convention (1911 ed.) ("Farrand") at 405-406, n.12, 407, n.12, 419, n.15; Pet. Reply Br. at 22-23; United States Br. at 18-19, n.19.

The Majority correctly states that "[n]o court has yet held that the appointments clause prohibits the creation of an interstate planning council with members appointed by the states". Majority Opp. at 9. However, because no court has yet addressed the precise issue raised in the case[1] does not leave the Majority free to ignore the clear [4] evidence of the Framers' intent. This refusal to acknowledge such evidence is an ahistorical

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[1] While Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), did adopt a substantive test for determining whether an individual is an "officer . . . of the United States," and therefore subject to the Appointments Clause, 424 U.S. at 125-126, the Court there was confronted with a case that concerned an attempt by the Congress to arrogate to itself power to appoint such officers. However, this does not mean that Buckley and related recent separation of power decisions are irrelevant. On the contrary, the concerns underlying these decisions are additional grounds for questioning the Majority's view of the separation of powers. See discussion, infra, III.A.4.

approach to the separation of powers repeatedly rejected by the United States Supreme Court and this court. See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 73-74, 102 S. Ct. 2888 (1982) (plurality) (rejecting rule of "board legislative discretion" for determining what matters need be heard by Art. III Courts in favor of an approach "rooted in history"); United States v. Woodley, 751 F.2d 1008, 1010 n. 3 (9th cir. 1985) (en banc) (upholding validity of recess appointments of Art. III judges) (federal courts' accord great deference to contemporaneous records of Framers' intent when deciding separation of powers questions).[2]

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[2] Indeed, in the landmark Appointments Clause case presently pending before the United States Supreme Court, Bowsher v. Synar, Nos. 85-1377, 85-1378, 85-1379, all the parties agree that a clear expression of the Framers' intent would be dispositive: the dispute is over whether one can discern such evidence. Compare United

. . . .

[10] 2. The Majority Misinterpreted the Meaning of a Critical Statutory Requirement, "Economically Feasible for Consumers." The Majority has substituted its own concept of "economic efficiency" for the Act's requirement that the MCS be "economically feasible for consumers." Majority Op. at 20-21. Nowhere do the Act, the legislative history or the Petitioners mention "economic efficiency". The Majority overlooked that its use of this concept is identical to the Act's standard of "cost-effective for the region." It has nothing to do with the

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footnote 2 continued

States Brief in Bowsher v. Synar, at pp. 13-21 (discussing Framers' intent) with Brief of the Speaker and Bipartisan Leadership Group in Bowsher v. Synar at 17, 25-28 (discussing Framers' intent regarding Comptroller General of the United States) (excerpts attached as Appendix to this Petition).

Act's independent standard of "economically feasible for consumers."

The Majority states that "the Plan relies on marginal cost to measure economic efficiency." Majority Op. at 20. Yet the Majority overlooked that this is the method by which the Council determined that the MCS were "cost-effective for the region." See [11] Plan Vol. I, 7-1 & 10-4; see also 16 U.S.C. § 839(a)(4). Compare 126 Cong. Rec. H9853 (daily ed. Sept. 29, 1980). The Majority then turns to the Act's legislative history. Yet none of the Majority's citations to that history concern the meaning of "economically feasible for consumers."

First, the Majority cites statements in the Congressional Record for the proposition that "economic efficiency should be based upon avoided cost, which is measured by marginal, not average, cost." Majority Op. at 21. Yet the

Majority overlooked that the two supporting cites are to discussions of the meaning of "cost-effective for the region." 126 Cong. Rec. 30181 (S 14692) (daily ed. Nov. 19, 1980) (justifying the 10% cost advantage given to conservation in the Act's definition of "cost-effective," 16 U.S.C. § 839a(4)(A) & (D)); H. R. Rep. No. 96-976 (Part I), 96th Cong., 2d Sess. 50 (1980) (explaining definition of "cost-effective").

Second, the Majority cites an earlier Senate Report. See Majority Op. at 21 (discussion S. Rep. No. 96-272, 96 Cong. 25 (1979)). Yet this report does not accurately express congressional intent. The Majority overlooked that the cited discussion involved an early, 1979 draft of the Act which did not distinguish between "cost-effective for the region" and "economically feasible for consumers." On the contrary, the draft at the time

blurred the distinction in its requirement that the MCS be "cost-effective for consumers." Id. at 4 & 25 (Re Sec. 4(f)).

As a result of these oversights, the Majority's equating of the concept of "economic efficiency" with "economically feasible for consumers" has abolished the distinction between "economically feasible for consumers" and "cost-effective for the region." Majority Op at 20-21. Yet the Act requires the MCS to be both "economically feasible for consumers and cost-effective for the region." 16 U.S.C. § 839b(f)(1) (emphasis added). If "economically feasible for consumers" is to mean anything, it must be different than "cost-effective for the region." No statutory provision should be construed as mere surplussage. Public Util. Comm'r of Oregon v. Bonneville Power Admin., 767 F.2d 622, 625 (9th Cir. 1985).

[12] Congress intended that each standard be unique. "Economically feasible for consumers" means that each, individual conservation measure must give the consumer more in savings of "average cost" electricity that the measure costs the consumer. 126 Cong. Rec. H9853 (daily ed. Sept. 29, 1980); H.R. Rep. No. 96-976, Part II, 96th Cong., 2d Sess. 43 (1980); explained in Pet. Op. Br. 28-40 & Pet. Rep. Br. 10-13.

The Majority incorrectly suggested that it may uphold an agency interpretation merely because it is reasonable. Majority Op. at 12-14 & 21. It overlooked the rule that when congressional intent is apparent it must followed [sic]. United States v. Clark, 454 U.S. 555, 560, 102 S. Ct. 805 (1982); United States v. Roach, 744 F.2d 1252, 1253

(9th Cir. 1984).[5] In Chevron USA, Inc. v. NRDC, 467 U.S. 837, 104 S. Ct. 2778 (1984), the Supreme Court deferred to a reasonable agency interpretation only after concluding that "Congress did not actually have an intent." 102 S. Ct. at 2783. Neither the Council nor the Majority followed congressional intent.

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[5] The majority overlooked that, until now, this Court has given precedence to congressional intent. In all cases cited by the Majority for deference to reasonable BPA interpretations, Majority Op. at 13-14, the legislative history was either absent, ambiguous, or supported BPA. Department of Water and Power v. BPA, 759 F.2d 684, 692-94 (9th Cir. 1985) (legislative history supports BPA interpretation); Central Lincoln Peoples' Utility Dist. v. Johnson, 673 F.2d 1076, 1081, as amended, 686 F.2d 708, 714 (9th Cir. 1982) ("legislative history does not supply clear support for either side"); Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585, 599-60 & 602 (9th Cir. 1981) (reliance on legislative history, when apparent); ALCOA v. Central Lincoln Peoples' Util. Dist., 467 U.S. 300, 104 S. Ct. 2472, 2481-85 (1984) (legislative history supports BPA interpretation).

APPENDIX U

Doc. 233/01396
MINUTES
CONSERVATION SUBCOMITTEE

May 21, 1982
1:00 p.m.

Northwest Power Planning Council Offices
700 S.W. Taylor Street, Suite 200
Portland, Oregon

. . . .

[2]III. Model Conservation Standards

Tom Eckman, Conservation Analyst on the Council staff distributed three issue papers ralated [sic] to the development of model conservation standards. He noted that the Act requires that three types of standards must be included in the plan: standards for new and existing structures, standards for utility, customer and governmental programs and standards for other consumer actions. Eckman asked that the subcommittee first focus its attention on the issue of the

appropriate level for the model standards. After some discussion, Hemmingway summarized three options:

1. Set standards at a level based on their cost-effectiveness compared to <u>average cost</u> paid by consumers. Offer consumers an incentive to achieve greater efficiency up to marginal resource costs.
2. Set standards at a level based on their cost effectiveness compared to the <u>marginal resource</u> cost faced by the region. Subsidize consumers to achieve these standards at a level equivalent to the difference between average and marginal cost.
3. Same as option 2, except offer no subsidy to achieve standards.

Both Hemmingway and Eckman indicated that the third option was prohibited by the Act, because it specifies that the standards must be "economically feasible for consumers".

APPENDIX V

Doc. 440/01494
NEW AND EXISTING STRUCTURES MODEL
STANDARDS AND CONSERVATION PROGRAMS
DECISION MEMORANDUM

ACTION

Recommendation 1 - The stafff recommends that the Council adopt the following model standards for new and existing structures for the purpose of its draft plan:

- o A standard for new residential structures which specified minimum total building performance with prescriptive and component attainment paths as alternatives. The proposed space heating performance standard for new single family and multifamily structures in kwh/sq. ft./yr. is shown in the table below:

Building Type	Climate Zone 1 (West of the Cascades)	2 (E.Wash/ E.Or & Idaho)	3 (W.Mont.)
Single Family	2.0	2.6	3.2
Multifamily (5-plex and larger)	1.2	2.3	2.8

- o A standard for new non-residential structures which is based on the most recent version of the American Society of Heating, Refrigeration and Air

Conditioning Engineers (ASHRAE) model energy code.

- o A standard for existing residential structures which specifies installation of all physically feasible measures deemed cost-effective* from the Region's view and which are fully financed by the Region. The cost-effectiveness determination may be made based on an on-site audit or by selecting items from an approved list of measures which have been demonstrated to be Regionally cost-effective.

[2] o A standard for existing non-residential structures based on an on-site technical audit, which specifies installation of all physically feasible measures deemed to be cost-effective from the Region's view and which are fully financed by the Region.

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*Section 4(f)(1) of the Act requires all Model conservation standards to be, among other requirements, "cost-effective for the region and economically feasible for the consumers." Throughout this memo the analysis is of what is "economically feasible for the consumer." The "cost-effectiveness analysis is made pursuant to Section 4(e)(1) when the other conservation resource is measured against listed resources.

Recommendation 2 - The staff recommends that the Council defer its decision on the following programs until its December 8 and 9 meeting.

- A reimbursement program to code enforcement agencies for the cost of model standards implementation and inspection. This includes the inspection cost of any entity (e.g. utility, local government, etc) which implements the model standard for existing structures.

- An incentive program, offered for a period of five years, which pays up to the full cost incurred by builders between current construction practice and those practices specified by the model standard for new structures.

- An incentive program which provides full financing of audit and retrofit measures for existing electrically heated and/or coolded [sic] residential and non-residential buildings.

- An education program for builders and code enforcement officials regarding the provisions of the Council's model standards for new structures.

- An incentive program to encourage the construction of structures which exceed the Council's efficiency standards for new structures.

- Provide for assistance program to the housing industry for the implementation of an energy performance rating system for new and existing residences.

- An incentive program targeted at the manufactured housing industry to encourage the sales of energy efficient units which achieved the following performance standards: Zone 1 - 3.0 kWh/Sq. Ft/yr., Zone 2 - 5.4 kWh/Sq. Ft/yr, and Zone 3 - 7.0 kWh/Sq. Ft/yr.

Recommendation 3 - The Staff recommends that the "economically feasible" level of the Council's model standard for new residential structures be determined according to the following presumptions:

Presumption 1. The "economically feasible" analysis is to be made by comparing individual conservation measures with the cost and performance of structures built to current standards.

[3] Comment. This assumption requires that individual measures (e.g., adding R-19 wall insulation) rather than packages (e.g. adding R-19 wall insulation, R-38 ceiling insulation and weatherstripping) be cost-effective. Consequently, "low cost, high payoff measures" are not averaged with "high cost, low payoff" measures to allow the latter to appear more economical. The use of existing standards as the point of comparison presumes they are, by political consensus, "economically feasible" for consumers.

Presumption 2. If the present value of the increased mortgage cost (due to the conservation investments) plus the present value of the energy cost is less than that for a structure built to current standards, the measure will be accepted as "economically feasible."

Comment. This assumption presumes that consumers are concerned about reducing the total annual (or monthly) cost of owning and operating a structure. Thus, if an energy conservation investment financed as part of a mortgage does not reduce the present value of their annual (or monthly) electric bill by enough to offset the present value of their increased mortgage payment, it is not "economically feasible."

Presumption 3. To accommodate the consumer's time preference for money, a real (i.e., inflation adjusted) discount rate which is equal to or greater than a real mortgage rate will be assumed.

> Comment. Consumer's [sic] individually tend to place a substantially higher value on near term cost and benefits than on those in future years. This characteristic is captured by a procedure known as "discounting". The higher the discount rate the less value consumers place on the future. Assuming a discount rate at least equal to or higher than the consumers mortgate rate implies that future cost savings from conservation are less important than the impact of the conservation investment on "first cost."

Presumption 4. Energy cost savings to determine if the measure is economically feasible are to be valued at an amount which is equal to the electric rate paid for space heating by consumers, including rate increases above inflation.

> Comment. This assumes that the price consumers pay per kilowatt hour for space heating will escalate over time at a rate greater than inflation. The exact values for all

the variables, such as long term mortgage (interest) rates and real escalation rates for electricity, etc., are not known with great precision. Subsequently, a sensitivity analysis was conducted. A sample of the results of this analysis are included in the accompanying "Issue Background" paper. Additional results from this analysis were presented to the Council during its November 3rd and 4th meeting.

APPENDIX W

MINUTES - MEETING NO. 36
PACIFIC NORTHWEST ELECTRIC POWER
AND CONSERVATION PLANNING COUNCIL

December 28-29, 1982
The Hilton Hotel
Portland, Oregon

Members Present:

Keith L. Colbo (MT)
Charles T. Collins (WA)
Daniel J. Evans (WA)
Alfred A. Hampson (OR)
Leroy H. Hemmingway (OR)
Larry Mills (ID)
Gerald H. Mueller (MT)
Robert W. Saxvik (ID)

Staff Present:

Thomas Eckman, Project Management Staff
James Fell, General Counsel
Thomas Foley, Project Management Staff
James Litchfield, Director -
Project Management
Marilyn Podemski, Associate Counsel
Edward Sheets, Executive Director
Beata Teberg, Staff Assistant
T Vinyard, Council Coordinator
John Wilson, Director -
Public Information

. . . .

INTRODUCTION

Noting that the meeting would be as much as possible in an informal working session format, Mr. Sheets recalled that the past

few meetings had focused on a resource portfolio which is one way of saying a mix of resources that Staff analysis indicates performs fairly well over a wide range of potential futures that the Region may be facing. The goal is to come up with a flexible mix of resources that performs well across a wide range of futures without necessarily committing the Region to overbuilding power plants.

Mr. Litchfield reviewed the elements involved in the analysis of conservation. Some points to remember:

-- Conservation measures are individual actions that can be taken at the points of end use of electricity to try to achieve efficient use of electricity (storm windows and doors, improved insulation, et cetera) . . . .

[4] MOTION Member Mueller moved acceptance
82-88 of Recommendation 3 and the four numbered Presumptions contained therein as follows: The Staff recommends that the "economically feasible" level of the Council's model standard for new residential structures be determined according to the following presumptions: PRESUMPTION 1. The "economically feasible" analysis is to be made by comparing individual conservation measures with the cost and performance of structures built to current standards. PRESUMPTION 2. If the present value of the increased mortgage cost (due to the conservation investments) plus the present value of the energy cost is less than that for a structure built to current standards, the

measure will be accepted as "economically feasible". PRESUMPTION 3. To accommodate the consumer's time preference for money, a real (i.e., inflation adjusted) discount rate which is equal to or greater than a real mortgage rate will be assumed. PRESUMPTION 4. Energy cost savings to determine if the measure is economically feasible are to be valued at an amount which is equal to the electric rate paid for space heating by consumers, including rate increases above inflation.

Motion was seconded by Member Collins, and passed unanimously by voice vote.

APPENDIX X

MEETING NO. 7
PNW ELEC POWER & CONSERVATION PLANNING COUNCIL
SEATTLE, WA
July 13-14, 1981

EVANS [Council Chairman]: The 7th meeting of the Pacific Northwest Power Council will come to order.

. . . .

[1a-14] HEMMINGWAY [Council Member]: Mr. Klauser, I think you made a number of statements that I would like to correct or at least get you to clarify. You talked about the cost effective standard in the Act means marginal cost pricing. I wonder if you could point to the place in the Act where marginal cost pricing is likely to occur, or that any consumer would pay for a conservation measure undertaken in that consumer's dwelling or business on a marginal cost basis.

KLAUSER [Seattle Master Builders Association Representative]: We have been keeping tabs on the voluminous amount of

material coming out of BPA, a tremendous amount of testimony. And it seems to us from our position that the rule of the game that we've been reading--now whether this is in the Act or not I can't specify--but the way, the direction everyone has been taking in the discussion of the concept of energy conservation cost effectiveness is weighing cost effectiveness against the last increment of power to be bought. Whether that means the 20-year WPPSS bonds cost, or some other.

HEMMINGWAY: That's correct, but is there anyplace where a consumer would pay for a conservation action on a marginal cost basis?

KLAUSER: Sure. They would pay for it in two ways, and my next speaker up will discuss that specific issue. But it comes down to this. Every action that is required of the consumer has a cost to it. And if it was insulation, for instance,

that would be equated with so much for kilowatt hour used. Now that amount of money, we feel, is the key issue--how much they spend on these various things that are legislated. And of course in the Act there is a major provision, speaking about the incentives first of all is there, but there is also the stick and the carrot. And the stick is if you don't follow our methodology that gets firmly established in all the states, and buy your [1a-15] electricity up to 1-1/2 times the cost it would cost everybody else. That's a major problematic area for us, and we feel that you better look at it in terms of whether you are really dealing with the scientific approach or is it just pie-in-the-sky computer analysis.

HEMMINGWAY: I don't disagree with you that we should look at it from a scientific approach, but I don't think you should misrepresent the Act that consumers are

going to be spending money after the marginal cost of electricity in conservation measures. And I think I can point to the provisions in the Act which we worked very hard on to ensure that that wouldn't happen. And I think that it's a disservice to the public for you to come here and represent that that's the case.

KLAUSER: Well, at this point we agree that it's very early to be discussing which direction it will finally take. We are alarmed at what is taking place down in Portland, and we've been able to sit in on hearings concerning the incentives, to be the formula for incentives. And we view that formula to be totally theoretical and to be assuming tremendous amounts. Now whether the Act says that or not, you may be totally correct. I'm not prepared to address that question. You're the expert on that issue. We're just trying to get off on ..... right now,

and we assume that you'll have plenty of time to correct that.

HEMMINGWAY: Well you did address it in commenting on cost effectiveness. You said I believe it's your duty to tell the public that these words mean marginal cost pricing.

KLAUSER: Well then if they're not, I stand corrected. Our point is that the direction that everyone seems to be going in--whether this Council is included or not, I don't know; but in terms of BPA--is that direction.

HEMMINGWAY: Well it is true that all conservation actions that are to be undertaken in the region are to be compared with the marginal cost, but that does not mean that consumers are going to pay the marginal cost for electricity or that they are going to undertake conservation actions in their houses or in their businesses which they have to pay for at

the marginal cost. If you'll read the Act you'll see that that isn't the case.

KLAUSER: Well we're very happy to hear that then, as long as that's the ?part? I was talking about.

. . . .

[1b-4] [KLAUSER:] On the next page, on 1., the cost effectiveness of each potential conservation action should be assessed. The cost effectiveness definition has to be expanded or more specifically set out that cost effective is to the one that the burden is imposed on, the consumer. Cost effectiveness is not the cost effectiveness to the utility that has to buy that additional increment of power because that additional increment of power is melded back into the total cost of the power, and it's unfair to make the new home buyer assume that total obligation. Now admittedly the incentives are there. There is some suggestion that they be as

high as $2.50/kwh, which is absurd. You could get an active solar system, I think, at $2.50/kwh. Not very cost effective or economic on anybody. But, in any case, I think that we want to talk in terms of equity, and Act talks in terms of equity, and that all residential users, new and old, should be treated the same.

The question where will our children live, the upward mobility of new home buyers is going to be restricted if they have higher costs imposed on them than the public generally.

. . . .

[KLAUSER:] I guess, Chairman Evans, since you've indicated that we should keep our remarks [1b-5] for another time on the technical or specific issues and substantive parts, I would reserve that and come at another time and advance that.

EVANS: We certainly will want--there certainly will be ample opportunity for that. It's obvious that you are making a

very important point and it is one which the Council will have to deal with at some length. I'm just trying to make sure that we get adequate opportunity for all to speak today and get us to the point, in turn, where we can finalize a workplan from which we can go into these other elements. So I think that these are useful points. Are there other questions from members of the Council?

HEMMINGWAY: We've heard the same thing again, that cost effectiveness should be measured only on the consumer of electricity, and we should only adopt measures which are cost effective to the consumer. If that's your position, Mr. McDonald, I suggest you lost that battle when Congress passed this Act. And if you go back to the definition of cost effectiveness, you'll see that cost effective, when applied to any measure or resource, means that such measure or resource must be

forecast to be reliable and available and to meet or reduce the electric power demand as determined by the ?counsel of? ?Council or? the Administrator of the consumer or customers at an estimated incremental system cost. And that's the critical issue--incremental system cost no greater than that of the least cost similarly reliable and available measure or resource.

Now it simply isn't within the power of this Council to adopt only such conservation measures which would be cost effective to the indivdual/consumer.

MCDONALD [Hombuilder]: Well I guess on 94, the Statute 2712 of PL 96-501, the Administrator, I guess would be where we have our remedy or relief because if he determines that any proposed conservat on measure or resource is not equitable or cost effective, or whatever, then apparently he has that power to

HEMMINGWAY: Well the idea in the Act was to have the conservation measures viewed from a system perspective. That is we would go out and look at what investments we could make from a system perspective that would save energy at a cost cheaper than building new generation. That does not mean that we're going to impose all of those costs of those conservation mesures on the consumers who are undertaking them. It may well be that the system will pick up a good portion of those costs.

[1b-6] MCDONALD: Well, Mr. Hemmingway

HEMMINGWAY: For instance you mentioned that a solar water heater would save only $90/year. Well, from a system perspective, if we price electricity at 8¢/kwh, which a lot of people are pricing the future cost of electricity, that solar water heater would save electricity at $360/year. And the region may find it

beneficial to invest that amount of money in that solar water heater in order to save that $360/year to the region, and not impose that entire cost on the consumer.

MCDONALD: I didn't specifically talk about incentives. I talked about mandatory conservation. If you require the new home buyer to assume the sole burden of the solar water heater, that's one thing. I think that's our argument. I didn't address

HEMMINGWAY: We're not even authorized under the Act

MCDONALD: I didn't address the collateral issue of incentives. If you or the BPA want to pay the full avoided cost vis-a-vis the average melded cost or retail cost of the utilities, that's a different issue.

HEMMINGWAY: We are required to do that under the Act, and I wish you'd go back to the Act and read it. If you read the

model conservation standard provision under the Act, we're allowed to design conservation standards only which are cost effective for the region and --conjunctive "and"--economically feasible for consumers, taking into account financial assistance made available to consumers from the Administrator. That was very well thought out by the Congress.

MCDONALD: That goes to the argument and the findings. And I would submit that I would think that these rulemaking procedures would be done in the Federal Administrative Procedures Act which should be a part of the workplan, too, Chairman Evans, I think. And so--and I don't think our case was lost with the Congress because we went through an analagous situation with the Washington Utilities and Transportation Commisssion. So I don't think that's correct. I don't think our day is gone. I think we still can be heard on this issue--the consumer . . .

EVANS: Do I hear you making assertion that it would be more beneficial to ultimately go out and build new resources at a higher price, higher marginal cost than you could obtain those same number of kilowatts through conservation measures? [1b-7] MCDONALD: No, I did not say that. I said that I did not think the new home buyer or renter, as opposed to the old home owner, should be imposed with a burden different than each other. That they should both, in effect, pay the same cost. Now if the BPA wants to give an incentive at 100%, that's a different issue. I'm not sure the ratepayers shouldn't examine whether it's cost effective. But we're not going to make that argument. Our primary argument is the fact that we don't think we should be treated differently as builders of new homes, nor should our customers, our buyers of new homes be treated differently.

EVANS: But, you're, of course, aware that that simply doesn't stand up. Consistently over the years new purchasers of goods, whether they are houses or automobiles, are subject to changing requirements, changing laws. People who run old cars don't have to meet the same pollution requirements as those who buy new cars. So they aren't treated exactly alike.

MCDONALD: Well I'm glad that

EVANS: The same is true in terms of housing.

MCDONALD: I'm glad you made that point, Chairman Evans. Historically, building codes have dealt with health, life, property, and safety. A structural engineer who ?over? ?only? designs a bridge by three, because if the bridge falls down you lose your life. But we're talking abut economic planning, and some of us believe that the marketplace is a better place for economic planning, and as

I indicated, it's not the historical application of a building code or a health code that we're talking about. We're talking about economic planning. And as I indicated, nobody's health, life, property, or safety are in jeopardy, and so therefore we have to treat this issue separately, differently.

EVANS: You will if the lights go out.

MCDONALD: Well I think Mr Ellis indicated that they were prepared to furnish all available power. I notice that the windmills--those 250-watt windmills, there aren't very many of them on line, and maybe you ought to put a few more of those on line, or coal, or whatever. But I think there's a lot of resources still available that haven't been used.

But as I indicated, I don't think the new home buyers should pay the very, very, very extreme avoided cost.

HEMMINGWAY: The Act doesn't authorize it.

[1b-8] MCDONALD: It's discretionary as far as you're concerned.

COLLINS [Council Member]: Don, the problem you present is a real one. And the whole heart of this Act, as I understand it, was designed to deal with that problem, that you couldn't expect individual conservors to pay for a marginally cost facility through savings of melded--through melded electrical rates. That's the whole idea of this Act, is to find a way to break that roadblock. And the way to break that roadblock is to relieve the person who is providing a system benefit not incurring an individual benefit at that level.

MCDONALD: But you don't do it with mandatory conservation in a power sales contract. You don't do it with a penalty

or a surcharge in a power sales contract. You don't do it by forcing where, in the technical validity of the code, which another speaker will address, is suspect as far as its cost effectiveness

COLLINS: The technical validity of the code, or of R values and U values is very much a point. Good point. I don't have any quarrel with that. I think what Mr. Hemmingway has objected to, and I am beginning to, Don, is that the problem that you raised has been solved. The idea of this Act is to secure more effective, cost effective resources through conservation and other techniques and to not place that burden on an individual consumer.

MCDONALD: Are you saying they're mutually exclusive?

COLLINS: I'm not saying--I'm saying this Act has made them in a very attractive way mutually exclusive. The problem that you've raised won't happen.

MCDONALD: Well maybe I don't understand it the same way you do. I don't see that. But I'm prepared to listen.

COLLINS: Well it's probably not the time or the place to pursue that.

MCDONALD: That's the ?forum? the Chairman indicated before.

EVANS: I think that that's something we will have to get at. But I think it's terribly important at this point to not mislead people as to what is likely to happen, or what the Act, itself, says. And I think both Mr. Hemmingway and Mr. Collins have pointed out, I think, quite clearly that it certainly was the intent of the drafters of the Act; I think it's quite clear [1b-9] in the language of the Act, that those individual homeowners are not to bear that marginal cost of electricity.

MCDONALD: You mean the new homeowners.

EVANS: The new homeowners. Any other questions from members of the Council? Thankyou very much.